89- 1375

No.

FILED
FEB 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BP EXPLORATION (ALASKA) INC.,
EXXON CORPORATION, and CHEVRON U.S.A. INC.,
Petitioners,

VS.

DOUGLAS B. BAILY, ATTORNEY GENERAL OF THE STATE OF ALASKA, LENNIE BOSTON-GORSUCH, COMMISSIONER OF NATURAL RESOURCES OF THE STATE OF ALASKA, GARY GUSTAFSON, DIRECTOR OF THE DIVISION OF LANDS, JAMES E. EASON, DIRECTOR OF THE DIVISION OF OIL AND GAS, AND WALTER L. CARPENETI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ALASKA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Can a federal court properly dismiss at the pleading stage petitioners' claim under 42 U.S.C. § 1983, alleging that an action currently pending against petitioners before a financially interested state court denies them due process of law, on the theory that the federal claim is not "ripe" for decision by the federal court until it has first been presented to the biased state court?

PARTIES

All of the parties to the proceedings below are listed in the caption to this petition, except that in the court below: (1) BP Exploration (Alaska) Inc. was then named Standard Alaska Production Company; (2) the Attorney General of the State of Alaska was Grace B. Schaible; (3) the Commissioner of Natural Resources of the State of Alaska was Judith M. Brady; and (4) the Director of the Division of Lands was Margaret J. Hayes.

The parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of the petitioners are listed in Appendix D, infra, App., pp. A-21 to A-33.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed April 21, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 874 F.2d 624, and is included in the Appendix at pp. A-1 to A-12. The opinion of the district court is set out in the Appendix at pp. A-13 to A-19.

JURISDICTION

The opinion and judgment of the court of appeals was entered on April 21, 1989. Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc was timely filed on May 5, 1989, and was denied on January 2, 1990. App., p. A-20. This petition was timely filed within 90 days of that date. 28 U.S.C. § 2101(c); Sup.Ct. Rule 13.4.

The jurisdiction of this Court to review the judgment of the court of appeals by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This action involves claims under 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The constitutional violation alleged under 42 U.S.C. § 1983 in this case arises from a pending Alaska state court action entitled *State of Alaska v. Amerada Hess Corp.*, Civil No. 1JU-77-847 ("*Hess*"). In *Hess*, the state of Alaska seeks to recover billions of dollars in oil royalties alleged to be owed by petitioners and other producers of crude oil in Alaska's North Slope under leases issued by the state. Petitioners, who are defendants in *Hess*, seek to enjoin the prosecution of *Hess* against them in Alaska state court on the ground that the continuation of that action is a violation of their Fourteenth Amendment right to a fair trial before an impartial tribunal.

In 1982, after the filing of *Hess*, the state enacted the Permanent Fund Dividend program providing every Alaska resident

with a financial interest in revenue derived from the state of Alaska's proprietary oil and gas leases. The denial of due process results from the fact that the monetary recovery sought by the state in *Hess* will substantially increase the Alaska Permanent Fund and, consequently, the annual dividend from the fund that every potential Alaska judge and juror has a statutory expectancy of receiving. In 1987, petitioners therefore brought suit seeking to require the state to pursue its claims in a forum where the judge and jurors have no financial interest in the case.

Petitioners have pleaded no state law claims in this case. As petitioners explained in the courts below, the Alaska statutes and rules regarding disqualification of judges and jurors make no provision through which this constitutional issue here could properly be presented in the Alaska courts. Every judge and juror in Alaska has an inherent bias in the *Hess* action by virtue of the fact that, by statutory or constitutional provision, every judge and juror in Alaska state court must be an Alaska resident. A successful challenge to any particular judge or juror would therefore simply result in their replacement by another judge or juror holding an indistinguishable disqualifying interest.

Further, during the pendency of the appeal below, the state of Alaska exacerbated the problem of the financially interested jury. In November 1989, the Alaska Supreme Court amended Alaska Civil Rule 47 to provide that the fact that a person has a "financial interest" in the outcome of the case as "a permanent Fund dividend recipient" is *not* a ground for jury disqualification even if that dividend would be affected by the "outcome of the case." Alaska Civ.Rule 47(c)(12).

1. *The Alaska Permanent Fund.* The Alaska Constitution provides that at least twenty-five percent of all mineral lease royalties received by the state are to be placed in a Permanent Fund to be used only for income-producing investments. Alaska Const. art. IX, § 15. To provide a means for distributing some of the state's mineral wealth to its citizens, the Alaska legislature provided in 1982 that roughly fifty percent of the yearly income produced by the Permanent Fund is to be paid to Alaska residents

as a dividend.[1] Every person who has resided in the state for the previous two years, regardless of age, is entitled to receive the yearly dividend. Alaska Stat. §§ 43.23.005(a), 43.23.015(b). Annual distribution of the dividend to all eligible residents is mandatory.[2]

2. *The Hess Litigation.* The state of Alaska is the lessor and royalty owner in oil and gas leases in the Prudhoe Bay and Kuparuk River fields on Alaska's North Slope. The leases grant Alaska a 12½ percent royalty interest in all oil and gas produced by the lessees. The state can take its royalty share in kind or in value. Through 1986, production from the Prudhoe Bay and Kuparuk River fields exceeded 5.2 billion barrels of crude oil and condensate. The lessees began making royalty payments in 1977

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[1] The method for determining the exact amount of the income available for dividend payments is provided for by statute. In essence, the amount for any year is reached by taking 50% of the income "available for distribution" (Alaska Stat. § 43.23.045(b)), which is defined as 21% of the net income of the Permanent Fund for the previous five years (including the year just ended). Id., § 37.13.140; see generally id., § 43.23.025.

The legislature originally provided in 1980 for a retroactive dividend payment that increased according to the number of years the recipient had lived in Alaska since 1959. Alaska Laws 1980, ch. 21. This Court struck down this provision in 1982 as a denial of equal protection (*Zobel v. Williams*, 457 U.S. 55 (1982)), and the current provisions were enacted in its place that same year.

[2] The state constitution specifies that "[a]t least twenty-five per cent of all mineral [royalties] * * * *shall* be placed in a permanent fund." Alaska Const. art. IX, § 15 (emphasis added); see also Alaska Stat. § 37.13.010(b) ("[p]ayments due the Alaska permanent fund * * * *shall* be made to the fund once each month") (emphasis added). The Alaska statutes then provide that the Alaska commissioner of revenue, "[n]otwithstanding any contrary provision of law, each year * * * *shall* transfer to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the [previous] fiscal year." Alaska Stat. § 43.23.045(b) (emphasis added). Finally, payment to all Alaska citizens is mandated in unequivocal language: "the department [of revenue] *shall* * * * annually pay permanent fund dividends from the dividend fund." Id., § 43.23.055 (emphasis added).

when production commenced and, through the end of 1986, had made royalty-in-value payments on approximately 375 million barrels of oil. The state of Alaska had also taken, through 1986, approximately 275 million barrels of crude oil and condensate as royalty-in-kind.

In 1977, the state of Alaska filed the *Hess* action against Prudhoe Bay oil and gas producers, including petitioners. In *Hess*, the state asserts that the lessees have been underpaying royalties as a result of improperly determining the value of the oil and gas produced. Using its interpretation of the leases, the state claims that the lessees presently owe nearly $1 billion in additional royalties on past production.[3] If the state is successful, its theory would also increase the value of royalties on future production by an additional $1 billion, and would entitle the state to another $600 million in contract adjustments on oil the state took in the form of royalty-in-kind.[4] By the state's own calculations, a favorable ruling in *Hess* would thus enrich the state by at least $2.6 billion.

As a result, if the state is successful in *Hess*, the annual dividends that every Alaska resident has an expectancy of receiving from the Alaska Permanent Fund will be directly and substantially increased.[5]

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[3] ER 10. Citations are to the Excerpts of Record in the court of appeals.

[4] ER 10. The state has sold most of the oil it has taken as royalty-in-kind under long-term sales contracts that contain an "*Amerada Hess* adjustment" clause, which retroactively adjusts the per-barrel price owed to the state according to the result in the *Hess* litigation. A $1 billion recovery in *Hess* on past production will result in the purchasers under these contracts owing an additional $600 million to the state on royalty oil sold through 1986.

[5] In addition, the state has asserted punitive damages claims in excess of $100 million against two of the petitioners. The $2.6 billion that the state estimates it will recover would enrich the Permanent Fund by $650 million, or $1200 for every eligible Alaska resident. Under the Permanent Fund legislation in effect when the Ninth Circuit rendered its decision, and based on the 12.1 percent annual rate of return achieved by

3. *Proceedings Below.*

a. Petitioners filed the present action under 42 U.S.C. § 1983 in the United States District Court for the District of Alaska. The complaint alleges that the *Hess* action in Alaska state court denies petitioners due process of law in violation of their Fourteenth Amendment right to trial before an impartial tribunal. Since they could substantially increase the annual Permanent Fund dividends that they receive by awarding the state the recovery it seeks in *Hess*, every potential judge and juror in Alaska state court has a direct and substantial financial interest in the outcome of that action.

Petitioners accordingly sought to enjoin the prosecution of the *Hess* action against them in Alaska state court. The injunction would not prevent the state from pursuing its royalty claims against the *Hess* defendants. It would merely require it to pursue those claims in an alternative, disinterested forum where the judges and jurors have no financial interest in the outcome of the case, such as the court of another state.

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the fund over its 10 years of existence, this recovery would have directly increased the value of the dividend check of every Alaska resident by over $70 per year in perpetuity.

Shortly after the Ninth Circuit's decision, the Alaska legislature amended the Permanent Fund dividend legislation to provide that "income earned on money *awarded after trial*" (emphasis added) in *Hess* would "not [be] available for distribution to the dividend fund." Alaska Stat. § 43.23.045(b). Based on the provision, the state filed a purported "Notice of Mootness" with the Ninth Circuit. However, petitioners pointed out that the new legislation did not eliminate the due process problem, in part because it applies only to moneys "awarded after trial" in *Hess*, and thus would have no application to the over $1 billion in future royalty payments pursuant to the declaratory judgment sought by the state in *Hess*, or to the $600 million in additional payments based on the *Amerada Hess* adjustment clause. See n. 4, supra.

The Ninth Circuit did not accept the state's suggestion of mootness. While the new legislation may affect the *size* of the financial interest of all Alaska judges and jurors in the outcome of *Hess*, it does not affect its *existence*. Thus, if the new legislation has any relevance at all, it bears solely on the merits of petitioners' due process claim, not on its ripeness.

This case was originally assigned to Judge Kleinfeld of the United States District Court for the District of Alaska. Judge Kleinfeld, an Alaska resident, recused himself, concluding that the $350 annual payment that he and his family would receive if the state were successful in *Hess* constituted a substantial interest that precluded him from hearing this case.[6] Judge Kleinfeld recognized that a "citizen of Alaska has an expectancy regarding his Permanent Fund dividend, and the amount of that dividend could substantially be affected by the litigation."[7]

The case was reassigned to Judge Belloni of the United States District Court for the District of Oregon. Defendants moved to dismiss, asserting that the complaint was barred by the Eleventh Amendment, that it failed to state a claim, that the district court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971), and that the claim was not ripe. The district court granted the motion solely on the ground of ripeness.[8]

b. The court of appeals affirmed. The court rejected the state's contention that this action, which seeks declaratory and injunctive relief against the state officials responsible for maintaining the *Hess* action based on their unconstitutional conduct, violated the

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[6] RT (3/8/88), pp. 34-40 (CR 42). Citations are to the Reporter's Transcript (RT) and the Clerk's Record (CR) in the court of appeals.

[7] RT (3/8/88), p. 39 (CR 42). Judge Kleinfeld stated:

> "I don't think we need go so far as to examine a judge's balance sheets and the exact size of his family. Mine is five * * *. Some judges have smaller families and they make less money off of dividends, but it doesn't matter a whole lot, it's still substantial. *It's substantial enough so that it would make a good hostile headline impairing the appearance of integrity of the judicial process.*" Id., pp. 39-40 (emphasis added).

Although Judge Kleinfeld recused himself under 28 U.S.C. § 455, he recognized that "[s]ection 455 adequately codifies *Tumey* [v. *Ohio*, 273 U.S. 510 (1927)] and other applicable constitutional law for purposes of this case." RT (3/8/88), p. 34 (CR 42).

[8] The court rejected the Eleventh Amendment and failure to state a claim arguments, and declined to rule on abstention. App., pp. A-14 to A-16, A-18 to A-19.

Eleventh Amendment. App., pp. A-4 to A-6. However, it affirmed the district court's decision that the action was not "ripe" for review.

The court of appeals failed to offer any single, coherent theory for its decision. For example, at some points, the court stated that petitioners had not demonstrated that "Alaska's disqualification procedures are inadequate to resolve the issue of bias" (id., p. A-9), noting that in Alaska judges may be challenged for cause upon a showing of financial interest. Id., p. A-10. The court did not address the fact that any such disqualification motion would be heard by the very same Alaska judges who are pecuniarily biased, in contradiction of repeated holdings of this Court that a litigant is entitled to an unbiased tribunal in the first instance and need not resort to a biased forum to cure that bias. *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 577-579 (1973). Moreover, the plain fact is that Alaska's disqualification procedures could not cure the alleged bias because every Alaska judge and juror shares the same disqualifying financial interest. Infra, pp. 17-18.

At other points, however, the court of appeals suggested that petitioners' federal due process claim was not "ripe" for decision by a federal court, not because state disqualification procedures had not been pursued, but because the due process claim itself had not been submitted to and decided by the very state court that was alleged to be pervasively and unconstitutionally biased. Thus, the court noted that "there has been no finding * * * that Alaska cannot provide an unbiased [tribunal] *to consider the Producers' federal constitutional claims*" (App., p. A-9) (emphasis added); that petitioners should submit "*a prompt due process challenge*" in state court (id., p. A-10) (emphasis added); and that petitioners "have failed to meet their burden of showing that the Alaska state courts cannot provide a fair tribunal *to hear their federal constitutional claims*" (id., p. A-11) (emphasis added). If this is what the court of appeals held, then it contradicted the long-standing principle that exhaustion of state remedies is not required in actions under 42 U.S.C. § 1983 (infra, pp. 23-24), as well as this Court's admonition in *R.R. Commission v. Duluth St. Ry.*, 273 U.S. 625 (1927) that:

> "[I]t must be remembered that the requirement that state remedies be exhausted is not a fundamental principle of substantive law but merely a requirement of convenience or comity. Where as here a constitutional right is insisted on, we think it would be unjust to put the plaintiff to the chances of possibly reaching the desired result by an appeal to the State Court when at least it is possible that as we have said it would find itself too late if it afterwards went to the District Court of the United States." Id. at 628.

This is precisely petitioners' concern here.

At still other points, the court appeared to rest its decision, not on the alleged availability of state disqualification procedures, or on a failure to exhaust alleged state remedies, but on the conclusion that the petitioners had not yet *proven as a fact* that their claim of financial bias was true. App., pp. A-10 to A-12. Thus, the court noted that petitioners had alleged that a judgment in favor of the state would increase each qualified Alaska resident's dividend check by $70 per year, but observed that "[n]o evidence has been presented, however, that supports this figure." Id., p. A-10. The court also stated that an evidentiary hearing might reveal whether some Alaska judges and jurors did not apply for benefits or whether, "in order to provide a forum for the trial of this matter," might be willing to waive their benefits. Ibid. The court concluded that "critical and dispositive factual questions remain unresolved" (id., p. A-11), and that petitioners' "claim of bias in the Alaska court system cannot be resolved until a factual presentation demonstrating bias is made *before the state trial judge*." Id., p. A-11 (emphasis added).

Of course, as pointed out below (infra, pp. 15-17), when an appellate court is considering a case dismissed on the pleadings under Federal Rule 12, it must presume that the facts presented by the plaintiff are true. Nevertheless, the court of appeals attempted to distinguish this Court's leading decision in *Gibson v. Berryhill*, 411 U.S. 564 (1973), which squarely held that a federal district court should *not* abstain in favor of proceedings before a state tribunal where, as here, *all* of its members were claimed to possess the same disqualifying financial bias, on the theory that there the federal district court had found that a disqualifying

financial interest did in fact exist, whereas in this case no evidence had yet been presented proving the existence of the financial interest alleged in the complaint. App., pp. A-8 to A-10.

The failure of the court of appeals to offer any consistent rationale for its decision is particularly troubling because it has made it impossible for petitioners to determine precisely what state proceedings are necessary to permit them to cure any "ripeness" problems while avoiding prejudice to their federal constitutional claim to a fair trial in a case in which the state seeks to recover over $2 billion.

REASONS FOR GRANTING THE WRIT

The decision below is important not only because it involves petitioners' claim to a constitutionally fair forum in an action seeking recovery of literally billions of dollars, but also because it has broad implications for the entire range of federal constitutional and civil rights litigation under 42 U.S.C. § 1983.

The ability of federal plaintiffs to obtain injunctive relief against state proceedings in which the decisionmakers are alleged to be biased has been a recurring issue that has produced divergent results, and differing rationales, in a number of recent decisions.[9] The particularly vexing nature of this issue, and its fundamental importance both to the constitutional rights of litigants and to the proper relationship between state and federal courts, alone make it worthy of review by this Court. Additionally, however, in attempting to justify its "ripeness" dismissal, the court of appeals articulated a series of erroneous and surprising doctrines that conflict with principles previously thought well-established, and which, if allowed to persist, would have sweeping application to defeat the proper exercise of federal jurisdiction in many actions under 42 U.S.C. § 1983.

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[9] Compare, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *United Church, etc. v. Medical Center Com'n*, 689 F.2d 693 (7th Cir. 1982), with *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989); *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981); and *Peterson v. Sheran*, 635 F.2d 1335 (8th Cir. 1980).

First, the court of appeals unequivocally held that for a federal constitutional claim to be "ripe" for decision by a federal court, the federal plaintiff must first prove the existence of the facts giving rise to that claim in state court. That holding is not only self-evidently incorrect, but was directly rejected by this Court in *Ohio Civil Rights Comm'n v. Dayton Schools,* 477 U.S. 619 (1986); see also *New Orleans Public Serv. v. Council of New Orleans,* 109 S.Ct. 2506 (1989).

Second, the court of appeals purported to ground its decision on this Court's leading abstention decision in *Gibson v. Berryhill,* 411 U.S. 564 (1973). In *Gibson,* however, this Court reached and resolved an indistinguishable due process claim on the merits, thus implicitly recognizing that the claim *was* ripe for decision. Moreover, *Gibson* squarely held that abstention in favor of pending state proceedings is *not* required where, as here, the state tribunal is "incompetent by reason of bias to adjudicate the issues pending before it." Id. at 577.

Third, by upholding a "ripeness" dismissal on the theory that the biased state tribunal should itself decide whether it is unconstitutionally biased, the court in effect requires petitioners to pursue and exhaust alleged state remedies as a prerequisite to submitting their due process claim to federal court. The court does not even mention numerous decisions of this Court holding precisely the contrary—that the doctrine of exhaustion of state remedies cannot be applied to section 1983 claims, and has never applied in any event to require exhaustion of state judicial remedies. See, e.g., *Patsy v. Florida Board of Regents,* 457 U.S. 496 (1982); *McNeese v. Board of Education,* 373 U.S. 668 (1963); *Monroe v. Pape,* 365 U.S. 167 (1961), overruled on other grounds, *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978); *Duluth,* supra, 273 U.S. at 628; see also *Felder v. Casey,* 108 S.Ct. 2302 (1988).

The court of appeals properly recognized that this case presents a "very delicate test of the joint responsibility of state and federal courts to provide every person with due process" (App., p. A-12), and stated that its decision rested on a desire to "avoid a needless conflict in this nation's dual court system." Id., p. A-11. That entirely commendable desire, however, did not justify the court's

disregard of the settled principles of ripeness, abstention, and exhaustion governing—and strictly limiting—the circumstances in which a federal court may remit federal civil rights plaintiffs to state court for resolution of their federal constitutional claims. The court ignored both the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them" (*Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 817 (1976)), and the "paramount role Congress has assigned to the federal courts to protect constitutional rights" (*Steffel v. Thompson*, 415 U.S. 452, 473 (1974)), and in so doing, significantly undermined the central purpose of the historic grant of federal jurisdiction over actions under 42 U.S.C. § 1983.

1. *Ripeness.* The court of appeals said that petitioners' due process claim was not "ripe" for review. However, the various arguments advanced by the court bear no relationship to any recognized theory of ripeness.

The central purpose of the ripeness doctrine is to prevent courts from deciding theoretical or abstract questions that do not yet have a concrete impact on the parties:

> "The basic inquiry is whether the 'conflicting contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.' " *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979), quoting *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93 (1945).[10]

In the present case, there is no question that the issues presented by petitioners' complaint are fit for decision. There is nothing hypothetical, speculative, remote, or contingent about the denial of due process presently resulting from the pending Alaska state court action in *Hess*. Petitioners seek to enjoin *currently ongoing* proceedings before a financially interested state tribunal

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[10] In making this inquiry, the court is to examine two factors: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

on the ground that they have an absolute due process right to the adjudication of *Hess* by a disinterested judge and jury.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). That right is violated whenever a judge or jury has a pecuniary interest in the outcome of the litigation. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (when "the adjudicator has a pecuniary interest in the outcome," the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable"); see *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973).

As this Court explained in *Tumey*, supra, while some questions of judicial disqualification do not rise to the constitutional level, a financial interest in the outcome of the case such as that here "certainly violates the Fourteenth Amendment" because it subjects a defendant's "liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial [and] pecuniary interest in reaching a conclusion against him in his case." 273 U.S. at 523. The mayor's receipt in *Tumey* of $12 per conviction, amounting in aggregate to $696 as the result of the convictions of those who came before him, violated the Constitution because:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." Id. at 532.

Tumey's "requirement of neutrality has been jealously guarded by this Court," and applies to "both civil and criminal cases." *Marshall*, supra, 446 U.S. at 242. Moreover, the right to a decisionmaker free of a pecuniary interest is absolute; it does not depend on any determination of actual bias or actual injury in the particular case:

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to

> prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. * * * Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted); accord, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

Petitioners' due process claim in this case thus presents a legal issue that "will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 581 (1985). Resolution of that issue need not await actual trial. Not only are ongoing pretrial proceedings before a constitutionally biased judge now being conducted,[11] but the undisputed financial interest that every Alaskan citizen has in the outcome of this case will not be any different at the time of trial than it is now. The positions of the parties are fully crystallized, and "[n]othing would be gained by postponing a decision" on petitioners' claim. Id. at 582.[12]

None of the reasons advanced by the court of appeals in support of its "ripeness" determination withstands analysis. The

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[11] In November 1989, the state filed a motion for partial summary adjudication in the *Hess* case against the petitioners here. The motion is pending before the state court.

[12] Nor is there any question that the hardship component of ripeness analysis is met in this case. Trial has been set by scheduling order for October 1990. The parties are presently engaging in extensive discovery in preparation for trial. If the state is constitutionally required to seek relief in an alternative forum, that determination should be made at the earliest opportunity to prevent as much needless delay and wasted pretrial and trial preparation as possible. Indeed, respondents themselves, although erroneously contending that the issues presented should be decided by the state court, argued in the district court that petitioners' due process claim should "be expeditiously resolved." CR 48, p. 9, n. 6.

court's suggestion that petitioners' due process claim would not be ripe until it was first submitted to and decided by the biased state court itself (App., pp. A-9 to A-11) would establish an unprecedented theory of ripeness, under which the "basic inquiry" would no longer be "whether the conflicting contentions of the parties * * * present a real, substantial controversy between parties having adverse legal interests" (*Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (internal quotations omitted)), but rather whether the federal court can avoid deciding that controversy by sending the plaintiff to a state court to resolve it. That very theory of ripeness was explicitly rejected by this Court in *New Orleans Public Serv. v. Council of New Orleans*, 109 S.Ct. 2506 (1989). This Court there held that a federal court challenge to a state rate order was ripe, even though the claim could have been raised and decided in a pending state proceeding. The Court noted that:

> "It is true, of course, that the federal court's disposition of such a case may well affect, or for practical purposes preempt, a future—or as in the present circumstances, even a pending—state-court action. *But there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts.*" Id. at 2520 (emphasis added).

The Court reached the same result in *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619 (1986). The plaintiffs in *Dayton Schools* asserted that pending state administrative proceedings against them violated their First Amendment rights. Unlike this case, there was no claim that the agency or the state courts were biased, and this Court determined that the state was competent to rule on the plaintiffs' constitutional claim. Id. at 629. *Despite these facts, this Court specifically held that the federal court could not dismiss the federal claim for lack of ripeness on the ground that the state tribunal "may rule completely or partially in appellees' favor."* Id. at 625, n. 1.

The court of appeals further asserted that petitioners' claim was not ripe on the theory that requiring them to first submit their claim of bias to state court would permit them to *prove* the factual

basis of their claim in that court.[13] But, the facts giving rise to petitioners' due process claim are set out in the complaint. In reviewing the district court's order granting the state's motion to dismiss, *the court of appeals was required to accept those allegations as true*. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, p. 594 (1969); *Gardner v. Toilet Goods Assn.*, 387 U.S. 167, 172 (1967); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). It is true, of course, that petitioners had presented no evidence in the district court in support of their allegations. But that was only because they were prevented from doing so by that court's erroneous grant of the defendants' motion to dismiss. The court of appeals' argument that a federal claim cannot be ripe for decision by a federal court until its underlying factual basis has first been proven in a state court is a wholly novel—and obviously unsupportable—exegesis on the theory of ripeness.[14]

The court of appeals' fundamental miscomprehension of this point is illustrated by its discussion of *Gibson v. Berryhill*, 411 U.S. 564 (1973). The court concluded that *Gibson* "does not support the Producers' argument" (App., p. A-7) because, unlike *Gibson* where a finding of bias had been made, "there has been no finding by any court" (id., p. A-9) and "[n]o evidence has been presented" (id., p. A-10) that Alaska judges and jurors possess a disqualifying financial bias as alleged in the complaint. The only reason for this, however, was that unlike petitioners here, the plaintiffs in *Gibson were not erroneously prevented from proving*

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[13] The court concluded that "[n]o evidence has been presented" to support petitioners' allegations regarding the size of the financial interest held by all Alaska judges and jurors (App., p. A-10); that "we do not have sufficient facts before us" to determine whether this interest requires disqualification (ibid.); that "critical and dispositive factual questions remain unresolved" (id., p. A-11); and that petitioners' claim "cannot be resolved until a factual presentation demonstrating bias is made" (ibid.).

[14] Thus, the court of appeals did not rely on any of the potentially valid reasons for finding that a claim is not ripe—e.g., that the facts giving rise to the claim are not presently in existence or that subsequent events might significantly alter petitioners' claim. See generally *Babbitt*, supra, 442 U.S. at 303-305; *Zemel v. Rusk*, 381 U.S. 1, 18-20 (1965).

their claim in federal court by a dismissal on ripeness grounds. Instead, the finding that the state board was biased in *Gibson* was made *by the federal district court* after the plaintiffs there had been permitted to establish their claim on the merits.

If the rule announced by the court of appeals were in fact the law, the plaintiffs in *Gibson* would never have had that opportunity. Instead, they would have been required as a matter of "ripeness" first to prove their claim of bias in the allegedly biased state tribunal. The fact that the federal court initially heard the evidence that established the unconstitutional bias of the state tribunal in *Gibson*, and that this Court on that basis concluded that abstention was also inappropriate (infra, pp. 20-21), is utterly inconsistent with the court of appeals' decision in this case that a claim of unconstitutional bias is not ripe until that claim has first been tried and proved in the biased state court itself.

Finally, the court of appeals attempted to justify its ruling by erroneously suggesting that a motion for disqualification in the state court might "cure" the bias problem. App., pp. A-10 to A-12. However, not only are petitioners entitled to an unbiased forum in the first instance (*Ward*, supra, 409 U.S. at 61-62; *Gibson*, supra, 411 U.S. at 577-579), but a disqualification motion in state court could not in any event provide a remedy because the financial interest alleged in this case results from the statutory expectancy of *every* Alaska judge and juror to receive dividends from the Permanent Fund. That financial interest constitutes a per se constitutional disqualification of every potential judge or juror in Alaska state court—each of whom, by statute, must be an Alaska resident—without regard to their subjective beliefs or personal circumstances. A successful recusal motion in Alaska state court would therefore simply result in the appointment of another Alaska judge having an indistinguishable disqualifying financial interest. Similarly, a successful challenge to any particular juror would result only in their replacement by another, equally disqualified juror.[15]

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[15] Moreover, a recent amendment to the Alaska Civil Rules, adopted after the decision of the court of appeals was rendered, makes it indisputable that there is no possibility that any action by the Alaska

The court of appeals also suggested that resort to state court should be required to determine whether some Alaska judges and jurors may not presently apply for dividend checks and whether any of them might be willing to "waive" their right to receive dividend checks so that they would be allowed to participate in the *Hess* case. App., p. A-10. Neither of these entirely speculative possibilities could have any effect on the present ripeness of petitioners' claim. If the *Hess* action is successful, the Permanent Fund will be permanently increased, and the dividend which every Alaska resident has a statutory expectancy of receiving would be increased *in perpetuity*. Thus, whether or not a particular judge or juror *currently applies* for dividend checks is irrelevant; their existing and absolute statutory right to receive future dividends is sufficient to disqualify them.

Similarly, even putting aside the obvious constitutional problem that would be presented by any Alaska judge or juror who expressed a willingness to "waive" their right to receive a substantial dividend check (amounting to almost $1,000 per person per annum) so that they could be allowed to sit in judgment on the oil companies operating in the state, any such hypothetical "waiver" would not bind the members of the judge or juror's family and would have to be monitored and enforced indefinitely in the years following the conclusion of the *Hess* litigation. Not only would this be wholly unworkable as a practical matter, but the purely speculative possibility of such a highly unlikely event could not in any event alter the *presently existing* financial disqualification worked by the Permanent Fund dividend legislation. See *Albertson v. SACB*, 382 U.S. 70, 76-77 (1965).

2. *Abstention.* Alternatively, respondents urged that the district court was required to abstain from decision under *Younger v. Harris*, 401 U.S. 37 (1971). The court of appeals, like the district court, stated that it would not reach that question in view of its decision on ripeness. App., p. A-12. Ironically, however, the court

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state court could "cure" the constitutional defect in this case. Alaska Civ. Rule 47(c)(12), adopted in November 1989, now specifically provides that no juror may be challenged for cause on the ground of his or her financial interest as a Permanent Fund dividend recipient. Supra, p. 3.

then attempted to support its unprecedented view of "ripeness" by a fallacious distinction of this Court's abstention decision in *Gibson v. Berryhill*, supra (App., pp. A-7 to A-10), and on the basis of several abstention cases in the courts of appeals decided in markedly different circumstances. The court so pervasively relied on these inapposite authorities that at one point it asserted "[w]e cannot determine from the present record whether this matter comes within the *Gibson* exception to *Younger* abstention" (App., p. A-10), as if it were actually ruling on a *Younger* abstention claim, rather than deciding, as it did, that petitioners' claim was not ripe. None of these *abstention* decisions provides the slightest support for the decision below, and the court's primary reliance on them only compounds the confusion that its opinion has created.

In *Younger*, this Court held that a federal court ordinarily should not enjoin pending state criminal proceedings, but should abstain to permit the federal plaintiff to present his federal defenses in state court.[16] As this Court has repeatedly recognized, however, the availability of an "adequate opportunity" to present the federal question in the pending state proceedings is a fundamental prerequisite in every case in which *Younger* abstention is sought. See *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 432 (1982). Absent such an opportunity, abstention would violate the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado*

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[16] *Younger* has subsequently been expanded to a limited category of civil cases involving "important state interests." Because *Younger* abstention was plainly inappropriate in this case under *Gibson*, this Court need not consider whether that additional requirement was met. But see *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 (1987) (*Younger* abstention proper only where state's interest in underlying litigation is "so important that exercise of federal judicial power would disregard the comity between the States and the National Government"); *Moore v. Sims*, 442 U.S. 415, 423, n. 8 (1979) ("we do not remotely suggest that every pending proceeding between a State and a federal plaintiff justifies abstention"); *New Orleans Public Serv. v. Council of New Orleans*, 109 S.Ct. 2506, 2519-2520 (1989) (*Younger* abstention not appropriate as to state ratemaking proceedings that were legislative in nature).

River Water Cons. Dist. v. U.S., 424 U.S. 800, 817 (1976).[17] "The policy of equitable restraint expressed in *Younger* * * * is founded on the premise that ordinarily a pending state prosecution provides the accused a *fair and sufficient opportunity for vindication of federal constitutional rights.*" *Kugler v. Helfant*, 421 U.S. 117, 124 (1975) (emphasis added). Thus, the policy announced in *Younger* does not apply to cases like this, in which, by reason of bias, "the state court [is] incapable of fairly and fully adjudicating the federal issues before it." Ibid.[18]

In *Gibson*, supra, this Court squarely held that an adequate opportunity to present a federal constitutional question does not exist, and that *Younger* does not apply, when the state tribunal has a financial interest in the outcome of the action as it does in this case. In that case, optometrists employed by an optical company sought a federal injunction to prevent the state board of optometry from revoking their licenses. They alleged that the state revocation proceedings violated their due process rights because the board was comprised of private optometrists (i.e., optometrists not employed by others) who stood to gain financially by the elimination of the plaintiffs as competitors. This Court held that under *Tumey v. Ohio*, supra, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them." 411 U.S. at 579. As a result, *Younger* abstention was inappropriate, even though, unlike this

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[17] See also L. Tribe, *American Constitutional Law* § 3-30, p. 204 (2d ed. 1988) ("[t]he ordinary rules [of *Younger* abstention] do not apply if a federal litigant's constitutional claim concerns the fairness of the very state proceedings which the ordinary rules would treat as an adequate constitutional forum").

[18] The Court in *Kugler* determined, after a lengthy review of state procedures for disqualifying judges, that the plaintiff's claim that he could not "receive a fair hearing in the state-court system [was] without foundation" (421 U.S. at 129), and that abstention was appropriate. As previously discussed, supra, the state procedures in this case cannot cure the inherent bias created by the Alaska Permanent Fund dividend legislation.

case, the board's decision was subject to de novo review by a disinterested court.[19] The Court emphasized that *Younger*

> "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for the appellees alleged, and the District Court concluded, that the State Board of Optometry was incompetent by reason of bias to adjudicate the issues pending before it. If the District Court's conclusion was correct in this regard, it was also correct that it need not defer to the Board. Nor, in these circumstances, would a different result be required simply because judicial review, de novo or otherwise, would be forthcoming at the conclusion of the administrative proceedings." 411 U.S. at 577.

The result in *Gibson* is controlling here. Indeed, this action presents an even stronger case for the exercise of federal jurisdiction than did *Gibson*: unlike the alleged indirect economic benefit resulting from the loss of a competitor found to be constitutionally impermissible there, the Alaska judges and jurors in *Hess* have a direct financial interest in the outcome of the case.

The court of appeals also cited three decisions in the courts of appeals. Each of these cases, however, was premised on the adequacy of the state's procedures for curing the alleged bias and they are thus inapposite here. For example, in *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981) (App., p. A-9), the court of appeals held that abstention was required to resolve a claim of actual, *personal* bias. Unlike the present case, in which an inherent pecuniary interest provides an absolute and objective constitutional disqualification of each Alaska judge and juror, the claim of personal bias in *Flangas* necessarily was individual to each judge. Thus, it required examination of individual circumstances and could be remedied by invoking provisions of state law that permitted the appointment of unbiased judges to replace

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[19] In this case, not only all Alaska trial judges, but also all Alaska appellate judges, are disqualified by their financial interest in Permanent Fund dividends. Infra, n. 22.

those who were disqualified.[20] The essential predicate for *Younger* abstention was therefore present: the state provided an adequate opportunity to raise the federal claims before an unbiased tribunal.[21]

By contrast, there is no question that the state's disqualification procedures are inadequate to cure the financial bias in *Hess*, which, unlike the claim of actual, personal bias in *Flangas*, affects every Alaska resident regardless of subjective belief, and works a per se constitutional disqualification of every potential judge or juror in Alaska state court. Successful invocation of the state's disqualification procedures would simply result in the appointment of another judge or juror having an indistinguishable pecu-

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[20] The plaintiff in *Flangas* also asserted that the "influence of one of the [allegedly biased] justices over the entire state judiciary is so pervasive that it would be impossible to assemble" a panel of unbiased judges to hear his claim. Id. at 950. The justice in question, however, had already recused himself from the proceeding, and the court determined that, without first requiring the plaintiff to attempt to disqualify and replace the other judges, it could not determine whether this claim could be substantiated.

[21] Similarly in *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989) (App., p. A-10), *subjective bias* was alleged to have resulted from prejudgment and prejudicial publicity. Whether a judge was in fact biased would turn on his or her subjective state of mind, and there was no reason to conclude that state law recusal procedures could not produce an unbiased tribunal. In contrast, no state law recusal procedure can remedy the *objective* financial bias of every Alaska judge and juror that results from the operation of the Permanent Fund dividend legislation (regardless of their state of mind).

The court of appeals also relied on the Eighth Circuit's decision in *Peterson v. Sheran*, 635 F.2d 1335 (8th Cir. 1980). App., p. A-11. Although that case did involve a ripeness dismissal, the very language quoted by the court makes clear that the Eighth Circuit's decision rested squarely on the fact that "all *state issues* have not been presented to the state court" and that a decision on these state issues "would obviate the necessity for *any court* to pass on the federal constitutionality issues." 635 F.2d at 1341 (emphasis added). In contrast, no state law recusal motion can obviate the due process problem in this case. Further, petitioners have pleaded no state law claims in this case.

niary interest.[22] *Gibson* establishes that, in such circumstances, the state tribunal as a whole is unconstitutionally biased and inadequate. The present federal action is the proper—and indeed the only—means by which petitioners can obtain a ruling from a disinterested court on their federal due process claim.[23]

3. *Exhaustion.* In addition to directing petitioners to pursue a nonexistent state remedy, the court of appeals asserted on at least three occasions that petitioners should make a "*prompt due process challenge*" (emphasis added) in the state court to obtain a ruling "that each Alaska judge and juror is not competent to hear this matter." Supra, p. 8; App., pp. A-10 to A-12. The court thus suggested that petitioners' section 1983 action must be dismissed to permit them to raise their federal due process claim before the biased state court. Such a requirement, however, would be contrary to nearly a century of this Court's precedents establishing that parties cannot be required, as a condition of proceeding in federal court under 42 U.S.C. § 1983, first to submit their federal claims to state court. See, e.g., *Bacon v. Rutland R.R. Co.*, 232 U.S. 134 (1914); *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908); see generally 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4233 (2d ed. 1988).

This Court has repeatedly and emphatically held that a plaintiff need exhaust neither state judicial nor administrative remedies before bringing a federal court action under 42 U.S.C. § 1983. See *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982); *Monroe v. Pape*, 365 U.S. 167 (1961), overruled on other

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[22] Nor is there any adequate remedy in Alaska's appellate courts, for every appellate judge is subject to precisely the same interest as the Alaska trial judges. Alaska Stat. § 22.05.070 (state supreme court justices must be Alaska residents); Alaska Const. art. IV, § 4 (same).

[23] The court of appeals also cited *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987). App., p. A-10. This Court's holding there, however, was simply that Texaco had failed to meet its burden to show that the state court would not provide a full and fair opportunity to consider Texaco's constitutional challenge to Texas' bond requirement. There was no claim in *Pennzoil* that the Texas state court had an interest in the outcome of the case.

grounds, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *McNeese v. Board of Education*, 373 U.S. 668 (1963). That is because of the bedrock principle that section 1983 was intended to provide a federal remedy for violations of federal rights supplementary and additional to any remedy that a state may provide. The central purpose of section 1983 was to provide an alternative federal forum for the vindication of such federal constitutional claims:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' * * *'[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972).

Thus, the court of appeals' statements that petitioners' due process claim was not "ripe" for decision until first submitted to and decided by the biased Alaska state court were wholly without foundation.

4. *Preclusion.* The decision of the court of appeals also conflicts with yet another well-established principle of federal jurisdiction. If the courts below were correct in dismissing this action on ripeness grounds, that dismissal necessarily was without prejudice to petitioners' right to renew their claim in federal court when it has become ripe. The district court stated that if the state court rejected petitioners' claims, "then the Producers are invited to re-open the federal case" (App., p. A-17), and the court of appeals explicitly endorsed that ruling. Id., p. A-12.

As this Court has recently reaffirmed on several occasions, however, where a state court has addressed and disposed of an issue, its decision is normally preclusive in subsequent federal litigation and would bar any attempt to return to federal court. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980); *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 80-85 (1984). Indeed, it is precisely for this reason that this Court has consistently

declined to require presentation of federal constitutional claims in state proceedings. See, e.g., *R.R. Commission v. Duluth St. Ry.*, 273 U.S. 625, 628 (1927). The requirement that federal constitutional questions first be submitted to state court for decision before they are "ripe" for decision by the federal court thus threatens to undermine the vindication of such rights and to rob the federal courts of the jurisdiction vested in them by Congress through enactment of section 1983.

This fundamental inconsistency in the rationale of the decision below further underscores the fallacy of the court of appeals' attempt, under the rubric of "ripeness," to require petitioners first to submit their federal due process claim to the Alaska state court for decision, and introduces an uncharted area of uncertainty into previously settled rules of claim and issue preclusion applicable to successive actions in state and federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

United States Court of Appeals
for the Ninth Circuit

Standard Alaska Production Company, Exxon Corporation, Chevron U.S.A., Inc.,
Plaintiffs-Appellants/Cross-Appellees,

v.

Grace B. Schaible, Attorney General of Alaska, Judith M. Brady, Comm'r of Natural Resources of Alaska, Margaret J. Hayes, Director of Div. of Lands, James E. Eason, Director of Div. of Oil and Gas, and Walter L. Carpeneti, Judge of Superior Court of Alaska,
Defendants-Appellees/Cross-Appellants.

Nos. 88-4008 and 88-4035

D.C. No. CV 87-521-RCB

OPINION

Appeal from the United States District Court
for the District of Alaska
Robert C. Belloni, District Judge, Presiding

Argued and Submitted
March 7, 1989—Seattle, Washington

Filed April 21, 1989

Before: Eugene A. Wright and Arthur L. Alarcon, Circuit Judges, and Edward Rafeedie*, District Judge.

OPINION

ALARCON, Circuit Judge:

Standard Alaska Production Company, Exxon Corporation and Chevron U.S.A., Inc. (Producers), appeal from the order granting the motion of Grace B. Schaible, et al. (State Officials) to

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* Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

dismiss this suit on the ground that the claim is not ripe. The State Officials cross-appeal from (1) the denial of their motion to dismiss pursuant to the Eleventh Amendment and (2) the refusal to dismiss this matter under *Younger v. Harris*, 401 U.S. 37 (1971).

I

We review independently, without deference to the district court's rulings, each of the issues raised on this appeal: (1) whether the district court erred in denying the motion to dismiss based on the ground that federal jurisdiction was lacking due to the Eleventh Amendment, *South Delta Water Agency v. United States Dept. of Interior*, 767 F.2d 531, 535 (9th Cir. 1985); (2) whether the district court erred in dismissing the case on ripeness grounds, *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation of Montana*, 792 F.2d 782, 787 (9th Cir. 1986); and (3) whether this suit should have been dismissed pursuant to the *Younger* abstention doctrine, *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987).

II

On September 2, 1977, the State of Alaska (Alaska) filed an action in an Alaskan trial court for injunctive and declaratory relief against Amerada Hess Corporation and eighteen North Slope oil companies including Standard Alaska Production Company, Exxon Corporation, and Chevron, U.S.A., Inc. *State of Alaska v. Amerada Hess Corporation et al.*, Civil No. IJU-77-847, (Hess). Alaska sought a declaration of its rights under certain oil and gas leases negotiated with the Producers.

On July 6, 1983, Alaska filed a second amended complaint in the state action seeking damages for underpayment of royalties pursuant to the leasing agreement. In this pleading, Alaska alleged it had not received all of its royalties because the Producers had been underestimating the value of the oil and gas taken from Prudhoe Bay and Kuparuk River oil fields. The state court proceedings are scheduled for trial on April 4, 1990.

In their amended complaint for injunctive and declaratory judgment, the Producers claim that there would be three basic adjustments to Alaska's share of royalties: (1) the lessees will owe at least $1 billion in royalties on past production; (2) the value of royalties on future production would increase by an additional $1 billion; and (3) Alaska would receive $600 million in contract adjustments on any oil previously received in the form of royalties-in-kind.

The Producers contend that "the monetary recovery sought by the state in *Hess* will substantially increase the Alaska Permanent Fund and, consequently, the annual amount of dividends from the fund that every Alaska resident has a statutory right to receive." Brief for Appellants at 3. Every resident of Alaska who applies and who meets certain residency requirements is entitled to receive an annual dividend from the earnings on the permanent fund investment. (Alaska Statute §§ 43.23.005-.015.) The residency requirements are: (1) that an applicant live in Alaska from October 1st through March 31st of the year preceding disbursement of dividends, and (2) the applicant submit a written statement of intent to remain a permanent resident of Alaska. *Id.* The amount of each year's dividend is determined by a fixed formula. (Alaska Statute 37.13.140).

III

On November 2, 1987, the Producers filed suit in the District Court for the District of Alaska for injunctive and declaratory relief under 42 U.S.C. § 1983 "on the ground that the continuation of [the state] action is a violation of their Fourteenth Amendment right to trial before an impartial tribunal." Brief for Appellants at 2. They claim that with an annual increase in dividends, "every potential judge and juror in Alaska state court has a direct and substantial pecuniary interest in the outcome of *Hess*." *Id.* at 3. The Producers argue that issuance of an injunction "would not prevent the state from pursuing its royalty claims against the *Hess* defendants, but would require it to pursue those claims in an alternative forum where the judges and jurors have no financial interest in the case, such as the court of another state." *Id.*

The State Officials moved to dismiss on the following grounds: (1) The Eleventh Amendment deprives the district court of subject matter jurisdiction; (2) There is no justiciable case or controversy; (3) Principles of comity and federalism embodied in the rule of abstention require dismissal; and (4) The complaint failed to allege sufficient facts to support a finding of a due process violation.

This matter was assigned to Judge Kleinfeld of the United States District Court for the District of Alaska. Judge Kleinfeld recused himself from presiding over this matter. Judge Kleinfeld advised the parties of the reasons he disqualified himself as follows:

> I don't think we need go so far as to examine a judge's balance sheets and the exact size of his family. Mine is five, as counsel obviously researched when they wrote their memorandum. Some judges have smaller families and they make less money off of dividends, but it doesn't matter a whole lot, it's still substantial. It's substantial enough so that it would make a good hostile headline impairing the appearance of integrity of the judicial process.

As a result of Judge Kleinfeld's recusal, Judge Belloni of the United States District Court for the District of Oregon was designated to preside over the federal court proceedings. The district court dismissed the Producers' federal cause of action on ripeness grounds. The court expressly denied the motions to dismiss based on the Eleventh Amendment and failure to state a claim. The court did not reach the State Officials' abstention arguments.

We first consider the State Officials' contention in their cross-appeal that the district court lacked jurisdiction to hear this matter because they are immune from suit under the Eleventh Amendment.

IV

The State Officials argue that there is no federal court jurisdiction over this matter because the Eleventh Amendment prohibits

a citizen from suing a state. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). Eleventh Amendment immunity extends to an action or a suit filed against a state agency or official. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-102 (1984). The Eleventh Amendment does not, however, preclude a suit to enjoin a state official from violating the federal constitution. *Ex Parte Young*, 209 U.S. at 159-60; *Pennhurst*, 465 U.S. at 101-103.

The Producers allege that the filing of the *Hess* action in an Alaskan state court is a violation of their right under the Fourteenth Amendment to an impartial tribunal. They contend that the monetary recovery sought in the *Hess* matter will increase the annual dividends paid to the Alaska residents. Thus, it is argued, every judge and potential juror in that state "has a direct and pecuniary" interest in the outcome of *Hess*. Brief for Appellants at 3.

The State Officials argue, however, that "the connection between them and the alleged due process deprivation must be deemed too tenuous to permit reliance upon the doctrine of *Ex Parte Young* to avoid the bar of Eleventh Amendment state immunity." Brief for Appellees at 36. They further argue that the essence of the Producers' claim "is directed at the effect of the Permanent Fund dividend program on the *Amerada Hess* judge and jury; their claim does not arise out of any allegation of unconstitutional conduct on the part of any of the defendants named here."*Id.*

The State Officials' argument is unpersuasive. They are the parties responsible for the filing and maintenance of the state court action against *Hess*. Grace B. Schaible is the Attorney General of Alaska. She is responsible for bringing civil suits on behalf of the state. (Alaska Stat., § 44.23.020(b)). Judith M. Brady, the Commissioner of Natural Resources of the State of Alaska, Mary J. Hayes, the Director of the Division of Lands, and James E. Eason, the Director of the Division of Oil and Gas are the officials responsible for collecting the royalty revenues in dispute in the state court proceedings. (*Id.* §§ 44.37.010-.020, 38.05.035.) The action was assigned for trial before Walter L. Carpeneti of the Superior Court of the State of Alaska. The

required connection with the enforcement of the act, under the doctrine announced in *Ex Parte Young*, is therefore present.

We find that the Eleventh Amendment does not bar the Producers from seeking relief in the federal courts and we affirm the district court's denial of appellees' motion to dismiss under Eleventh Amendment state immunity.

V

The Producers contend that the district court erred in granting the state officials' motion to dismiss on the ground that the issue was not ripe for review. The Producers allege that "the district court failed to address the relevant questions governing the ripeness determination." Brief for Appellants at 13.

The doctrine of ripeness is intended "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. A claim is fit for decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *Friedman Brothers Investment Co. v. Lewis*, 676 F.2d 1317, 1319 (9th Cir. 1982).

The Producers contend that their due process claim is ripe for review because "there is nothing hypothetical, speculative, remote, or contingent about the denial of due process presently resulting from the pending Alaska state court action in *Hess*." Brief for Appellants at 10. They claim that their action seeks "to enjoin *currently ongoing* proceedings before a financially interested tribunal on the ground that they have an absolute due process right to the adjudication of *Hess* by a disinterested judge and jury." *Id.* (emphasis in original). They argue that "[t]he right to a decisionmaker free of a pecuniary interest is absolute [and] it does not depend on any determination of actual bias." *Id.*

at 11. The Producers assert that their "due process claim in this case thus presents a legal issue that 'will not be clarified by further factual development.' " *Id.* (citation omitted). They claim that the financial interest of every Alaskan judge or juror in the outcome of the pending state proceedings supports a ruling that, as a matter of law, Alaska cannot provide an unbiased tribunal.

The Producers argue further that the district court should not have dismissed their claim on ripeness grounds because "the state's disqualification procedures are inadequate to cure the financial bias in *Hess,* which, . . . affects every Alaska resident regardless of subjective belief, and works a per se constitutional disqualification of every judge or juror in Alaska state court." *Id.* at 24. They contend that "[s]uccessful invocation of the state's disqualification procedures would simply result in the appointment of another judge or juror having an identical pecuniary interest." *Id.* at 24-25. The Producers rely on *Gibson v. Berryhill,* 411 U.S. 564 (1973), for the proposition that "an 'adequate opportunity' does not exist where, as in this case, the state tribunal has a financial interest in the outcome of the case:

> '[*Younger*] naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved. Here the predicate for a *Younger v. Harris* dismissal was lacking, for appellees alleged, and the District Court concluded, that the State Board of Optometry was *incompetent by reason of bias to adjudicate the issues pending before it.*" (*Id.* at 577) (emphasis added).' "

Reply Brief for Appellants at 21.

A brief summary of the issue before the Supreme Court in *Gibson* will readily demonstrate that it does not support the Producers' argument. In *Gibson,* the Alabama Optometric Association (Association) filed with the Alabama Board of Optometry (Board) charges against various optometrists (the employee-pharmacists) who were practicing their profession as employees of Lee Optical Co. The Association asked the Board to revoke the licenses of each of the employee-optometrists. The Association alleged that the practice of optometry by individuals employed by a business establishment was unethical conduct. *Id.* at 567-68.

Two days later, the Board filed a suit in state court against Lee Optical Co. "seeking to enjoin the company from engaging in the 'unlawful practice of optometry.' " *Id.* at 568. The state court enjoined Lee Optical from practicing optometry without a license or from employing licensed optometrists. Thereafter the Board scheduled hearings on May 26th and 27th on the unethical conduct charges brought against the employee-optometrists by the Association.

The employee-optometrists filed suit in the United States District Court against the Board, its individual members, and the Association pursuant to the Civil Rights Act, 42 U.S.C. § 1983, for an injunction against the scheduled license revocation proceedings. *Id.* at 569. The employee-optometrists alleged that they could not get a fair and impartial hearing because the Board was biased. *Id.* at 570.

The district court concluded that the Board was so biased by pecuniary interests that it could not conduct the revocation hearings. *Id.* at 578. The district court found that of the 192 licensed optometrists in Alabama, 92 were employed by a business establishment. None belonged to the Association. Each member of the Association was an independent optometrist engaged in private practice for his own accord. Only members of the Association were eligible to be members of the Board. *Id.* at 578. The district court concluded from these facts that revocation of the employee-optometrists licenses "would possibly redound to the personal benefit of members of the Board." *Id.* at 578.

The Supreme Court concluded that the district court's findings were not clearly erroneous. *Id.* at 579. Accordingly, the Supreme Court held in *Gibson* that, based on the district court's findings, "the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose." *Id.* at 579. The Supreme Court also concluded that the district court did not err in failing to abstain because the matter was pending before the Board. *Id.* at 577. The Court instructed that the application of *Younger v. Harris* "presupposes the opportunity to raise and have timely decided by a *competent* state tribunal the federal issues involved." *Id.* (emphasis added). The Supreme Court concluded that "the State Board

of Optometry was incompetent by reason of bias to adjudicate the issues before it." *Id.*

In the matter before this court, there has been no finding by any court that Alaska cannot provide an unbiased trier of fact and appellate court to consider the Producers' federal constitutional claims. The Producers have not presented to the state courts their claim that all Alaskan judges and prospective jurors are biased because of a substantial pecuniary interest in the outcome of the pending proceedings in *Hess*. The simple fact that the Producers claim that there is no competent court in Alaska to preside over the injunctive and declaratory relief action does not demonstrate that Alaska's disqualification procedures are inadequate to resolve the issue of bias. In *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), the Supreme Court obvserved:

> [W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.'

Id. at 628 (citation omitted).

In *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), the appellant obtained an injunction from the District Court of Nevada to bar the remaining unrecused judges of the Supreme Court of Nevada from hearing disciplinary proceedings against an attorney based on affidavits alleging that bias against him by the present members of the court would also taint any substitute judges from the trial court. *Id.* at 947-48. We reversed the order granting the injunction. We distinguished *Gibson* on the ground that the failure of the appellant to utilize Nevada's disqualification procedures makes it impossible for us to determine whether the factual allegations of pervasive bias were true. *Id.* at 950. We held that "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.' " *Id.* (citation omitted). We also noted in *Flangas* that "[t]here is no indication in *Gibson* that there was a statutory procedure for disqualification of the biased Board members." *Id.*

In Alaska, judges may be challenged for cause upon a showing of financial interest in the matter. (Alaska Statute 22.20.020.) At such a proceeding, the Producers can mount a challenge to the imparitality of the Alaska judges by attempting to show that each of them has a *substantial* pecuniary interest in the outcome of the *Hess* matter. We cannot determine from the present record whether this matter comes within the *Gibson* exception to *Younger* abstention. In *Gibson*, a decision to revoke the licenses of all optometrists employed by a business establishment would have reduced competition by almost fifty percent. Because all Board members were in private practice, revocation would mean that it was possible that each Board member could almost double his income through fees obtained from former patients of the employee-optometrists. Here, the Producers argue that a judgment for Alaska would ultimately increase a qualified resident's dividend from the permanent fund by $70 a year. No evidence has been presented, however, that supports this figure. Assuming that it is accurate, we do not have sufficient facts before us to determine whether an increase of $70 in dividends as a result of a favorable judgment for the state in *Hess* would constitute a substantial financial interest compelling disqualification for cause. An evidentiary hearing will also inform a reviewing court whether all Alaska judges and jurors have applied for permanent fund dividends or whether, in order to provide a forum for the trial of this matter, any are willing to waive such benefits.

The Producers' failure to raise their claim of bias before the Alaska courts has denied that state's judges the opportunity to determine whether they must decline to hear this matter because they have a substantial interest in the outcome of this matter. In *Partington v. Gedan*, No. 87-2375, slip op. 2161 (March 13, 1989), we stated that when a party " 'has not attempted to present his federal claims in related state court proceedings, [we will] assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.' " *Id.* at 2177 (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987)). Here, a prompt due process challenge in the Alaska trial court may result in a factual determination that each Alaska judge and juror is not competent to hear this matter. Such a ruling would eliminate the federal constitutional claim without

federal court interference and avoid a needless conflict in this nation's dual court system.

In addition, the Producers have failed to meet their burden of showing that the Alaskan state courts cannot provide a fair tribunal to hear their federal constitutional claims. *See id.* (a litigant bears the burden of showing "that state procedural law bar[s] presentation of [his] claims") (citation omitted). Instead, the Producers have bypassed the Alaska court system on the sensitive issue of its ability to provide a fair and impartial trial in this matter. As a result, critical and dispositive factual questions remain unresolved.

We agree with the explanation by the Eighth Circuit of its disposition of an appeal regarding a similar claim of bias:

> The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness. If requested to do so, some state supreme court justices might well rule under the record presented to them that they should step aside and allow others to be designated in their place. If some recuse themselves, and we in no way suggest that they should or shouldn't, this would obviate the necessity for any court to pass on the federal constitutionality claims. Thus, we rule the constitutional issues are not ripe for decision since all state issues have not been presented to the state court.

Peterson v. Sheran, 635 F.2d 1335, 1341 (8th Cir. 1980) (citation omitted).

The district court did not err in determining that the Producers' claim of bias in the Alaska court system cannot be resolved until a factual presentation demonstrating bias is made before the state trial judge.

The Producers claim that the failure of the district court to decide whether an injunction should issue on ripeness grounds creates a hardship for them. No showing has been made that the Producers will suffer any hardship by presenting to the state evidence, if any exists, that the Alaskan judges and potential jurors have a substantial pecuniary interest in the outcome of the *Hess* matter. The Producers argue that "[i]f the state is constitutionally required to seek relief in an alternative forum, that

determination should be made at the earliest opportunity to prevent as much needless delay and wasted pretrial and trial preparation as possible." Brief for Appellants at 12. This is a surprising argument for the Producers to assert. They have had several years to present a disqualification motion in the state court regarding the competency of any Alaska judge to try the *Hess* matter. They have not done so. Any injury suffered by the delay in determining the Producers' bias claim has been self-inflicted. The Producers suggest that if they prevail on their disqualification theory, this matter can be tried in an "alternative forum." If so, no time has been wasted in trial preparation.

We are persuaded from our independent review of the meagre record before us, that the question of the capacity of the State of Alaska to provide a fair and impartial trial and appellate review in the *Hess* matter is not ripe. Until a proper motion for disqualification is made in the state court, the disputed factual questions concerning the alleged bias of all Alaska judges and jurors cannot be reviewed by any federal court.

In dismissing this matter without prejudice, the district court issued a challenge to the State of Alaska "to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors" within a reasonable time. The district court invited the Producers "to re-open this federal case" if the State Officials fail to provide an unbiased forum within a reasonable time. We applaud the district court's wise resolution of a very delicate test of the joint responsibility of state and federal courts to provide every person with due process.

VI

In their cross-appeal, the State Officials contend that the district court should have dismissed this matter pursuant to the doctrine of *Younger v. Harris*. We need not address the merits of this issue because we have determined that the district court properly dismissed the federal constitutional issue raised in this matter because it is not ripe for review.

VII

The district court's order denying the motion to dismiss pursuant to the Eleventh Amendment is Affirmed. The order dismissing this matter because it is not ripe is Affirmed.

Appendix B

In the United States District Court
for the District of Alaska

Standard Alaska Production Co., Exxon Corporation, and Chevron U.S.A., Inc.,
Plaintiffs,

v.

Grace B. Schaible, Attorney General of the State of Alaska, Judith M. Brady, Commissioner of Natural Resources of the State of Alaska, Tom M. Hawkins, Director of the Division of Lands, James E. Eason, Director of the Division of Oil and Gas, and Walter L. Carpeneti, Judge of the Superior Court of the State of Alaska,
Defendants.

Civil No. 87-521

OPINION

BELLONI, Judge.

FACTS

In 1977, the State of Alaska (the State) filed suit in Alaska Superior Court against Amerada Hess Corporation and 17 other North Slope oil producers, including plaintiffs in this action, Standard Alaska Production Company, Exxon Corporation and Chevron U.S.A. Inc. (the Producers).

In that suit, *Amerada Hess*, the State seeks a determination of its rights under certain oil and gas leases which it had issued to the Producers. The State seeks damages for the alleged underpayment of royalties under the leases.

The Producers filed this federal court action for injunctive and declaratory relief under 42 U.S.C. § 1983. Producers claim that trial of *Amerada Hess* in Alaska will violate their due process rights under the Fourteenth Amendment to the United States Constitution. They seek a permanent injunction restraining the named state officials and Judge Walter Carpeneti from prosecuting *Amerada Hess* against them in Alaska. The Producers assert

that prosecution of *Amerada Hess* violates the Producers' constitutional rights because the judge and jurors in that case will have a financial interest in the outcome. This follows because, as residents of Alaska, they will receive yearly Permanent Fund dividends[1] which will in part be derived from earnings on any money awarded to the State in *Amerada Hess*.

Defendants Schaible, Brady, Hawkins and Eason (State Officials) move this court to dismiss. The State Officials move to dismiss alleging that the complaint is defective in four respects:

1. The eleventh amendment to the United States Constitution deprives this court of subject matter jurisdiction.

2. There is no justiciable case or controversy.

3. Principles of comity and federalism embodied in the rule of abstention, *Younger v. Harris*, 401 U.S. 37 (1971) require that this case be dismissed.

4. The complaint fails to state a claim because allegations cannot support a finding of due process violation.

DISCUSSION

1. ELEVENTH AMENDMENT

The State Officials move to dismiss this § 1983 action because they allege the eleventh amendment to the United States Constitution deprives this court of subject matter jurisdiction. In this action the Producers named only the state officials in their official capacity and have not formally named the State of Alaska as a defendant. The State Officials assert that the State is the real party in interest because the object of this suit is to restrain the

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[1] In 1976, the Alaska Constitution, Article IX § 15 was amended to establish the Permanent Fund. The purpose of the fund was to set aside some of the wealth which the State was accumulating from its oil, a non-renewable resource. The State issues oil leases which produce royalties and at least 25 percent of all the royalties must be paid into the Permanent Fund. Alaska Stat. § 37.13.010 (1987). Annually, the residents of Alaska receive a dividend from the earnings of the Permanent Fund.

State from acting in its sovereign capacity by prohibiting it from litigating *Amerada Hess*. The State Officials contend that this action does not fall within the rule of *Ex parte Young* because there is no cognizable nexus between the alleged constitutional deprivation and the conduct of the State Officials.

The Producers contend that this case is not barred by the eleventh amendment because the complaint alleges viable claims within the doctrine of *Ex parte Young*. The Producers argue that the action is proper because they are seeking prospective equitable relief against the State Officials for alleged constitutional violations.

The eleventh amendment to the United States Consititution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

This amendment prohibits federal courts from entertaining suits brought by private citizens against a state in the absence of that state's consent. Under the eleventh amendment, states are immune from private damage actions in federal court. However, the eleventh amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908).

In order to deal with unconstitutional state action and thereby give effect to the fourteenth amendment, the United States Supreme Court in *Ex parte Young* held that the eleventh amendment did not bar prospective injunctive relief against state officials accused of violating the Constitution. 209 U.S. 123 (1908). This creates a legal fiction because a state officers' alleged unconstitutional actions can be considered personal for purposes of the eleventh amendment but can be considered state action for fourteenth amendment purposes. This legal fiction was recognized in *Jackson v. Hayakawa*, 682 F.2d 1344 (9th Cir. 1982) where Judge Goodwin stated:

> Suits for injunctive relief stand on an entirely different footing. In an unbroken line of authority extending back over 70 years, prospective equitable relief has been issued where state officials were the nominal defendants although in fact the states were the real parties in interest. *Ex parte Young*, 209 U.S. 123 (1908); [some cities omitted] *Beal v. Vecchione*, 434 U.S. 943 (1977) ('We recognize that for eleventh amendment purposes the *Ex parte Young* type suit is a legal fiction, and that as a practical matter the . . . injunction [does] bind the Commonwealth.').

Jackson at 1351.

The Producers are seeking prospective injunctive relief against the state officers for alleged constitutional violations, consistent with *Ex parte Young*. There is a sufficient nexus between the state officers and the alleged constitutional violations. Therefore, the State Officials' motion to dismiss the Producers' § 1983 action based on the eleventh amendment bar is denied.

The State Officials argued in their initial brief that the case should be dismissed because the State is an indispensable party under Fed. R. Civ. P. 19 and cannot be joined without depriving this court of subject matter jurisdiction. The State Officials failed to raise this contention at oral argument and it is unclear whether they have abandoned this argument. I find no merit in this argument.

2. JUSTICIABLE CASE OR CONTROVERSY

A. Ripeness.

The State Officials assert that this case is not ripe. Before a party may allege a denial of constitutional rights in a § 1983 action, it must be established that those rights have been violated or that such a violation is imminently threatened.

The Producers contend that the case is ripe. The Producers assert that the constitutional violation alleged is occurring and will continue to occur. They argue that the dispute is concrete and crystallized, and that the passage of time will not make it more so.

Ripeness requires an actual, concrete dispute between the parties which can be resolved judicially and examines the related

question of whether the challenged governmental conduct has had any practical impact upon the plaintiff. *Laird v. Tatum*, 408 U.S. 1, 13 (1972). The present case is not ripe for review because we do not know that Alaska cannot provide a fair forum. This action is not ripe until that is tried and we do know. Therefore the State Officials' motion to dismiss the Producers' § 1983 action is granted. This dismissal is without prejudice to the Producers' right to re-open this case if the defendant State Officers are unable to provide a forum which will ensure a fair trial before an unbiased judge and unbiased jurors. This need not necessarily be within the framework of *Amerada Hess* nor necessarily a forum within the State of Alaska. If the State does not provide such a forum within a reasonable time, it will be presumed that it cannot do so.

As a practical matter, giving the State Officials the opportunity to provide an unbaised forum is a better way to learn whether they can do so than to deny the motion to dismiss. In the latter case, the Producers could file a motion for summary judgment and this court could consider affidavits in an effort to try to determine whether an unbiased forum could be found. Giving the State Officials the opportunity to provide the forum would prove conclusively whether they can do so. By prevailing on this motion to dismiss, the burden is on the State Officials to provide an unbiased forum which will resolve the contentions of both sides. If the State Officials fail to provide an unbiased forum within a reasonable time, then the Producers are invited to re-open this federal case which requests the State Officials be enjoined from prosecuting *Amerada Hess*. Or the Producers could elect to pursue appeals through the state system and ultimately to the United States Supreme Court. Obviously, it would be to the advantage of the State Officials to provide such a forum.

Nothing in this opinion is to be taken as any indication that I believe such a fair forum does not exist in the Superior Court for the State of Alaska in the First Judicial District Court at Juneau and with Judge Carpeneti presiding. Nor do I imply that this could not be accomplished within the framework of the *Amerada Hess* litigation.

B. Judge Carpeneti

The State Officials assert that the claim against Judge Carpeneti is not sufficiently adversarial for adjudication under Article III. However, Judge Carpeneti has not asked to be dismissed and the State Officials have no standing to ask that he be dismissed.

3. YOUNGER V. HARRIS ABSTENTION DOCTRINE

The State Officials contend that this court should abstain based on the *Younger v. Harris* doctrine and principles of comity and federalism. The State Officials state that abstention under *Younger* is appropriate because (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests and (3) the State proceedings provide an adequate opportunity to raise federal questions. *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423 (1982). The Producers argue abstention is inappropriate because the second and third prongs of the *Younger* test have not been met.

I decline to consider the merits of this claim because it is premature in light of my ruling on ripeness. The State Officials' motion to dismiss the Producers' § 1983 action based on the *Younger* abstention doctrine is denied.

4. FED. R. CIV. P. 12(b)(6)

The State Officials move to dismiss because the complaint fails to state a claim upon which relief may be granted. The State Officials contend that as framed by the allegations of the Producers' complaint, the *financial interest* to the presiding judge and jurors is not of constitutional significance because the interest is both small and remote. The Producers contend that the financial interest alleged is substantial and therefore constitutionally impermissible.

The standards for deciding a Fed. R. Civ. P. 12(b)(6) motion have been stated as follows:

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In determining the motion, the court must presume all factual allegations of the complaint to be true and all reasonable inferences are made in favor of the non-moving party. *Kugler v. Helfant*, 421 U.S. 117 (1975).

To grant this motion to dismiss I must say there is beyond doubt no set of facts which the Producers have alleged that would amount to a due process violation. I cannot do that at this point. I deny the State Officials' motion to dismiss for failure to state a claim upon which relief can be granted.

While I deny summary judgment and allow *Amerada Hess* to proceed, I expect the State Officials to show us (not tell us) how to proceed constitutionally with the lawsuit.

Dated this 20th day of June, 1988.

ROBERT C. BELLONI
Robert C. Belloni
United States District Judge

Appendix C

United States Court of Appeals
for the Ninth Circuit

Standard Alaska Production Company, Exxon Corporation, Chevron U.S.A., Inc.,
Appellants/Cross-Appellees,

v.

Grace B. Schaible, Attorney General of Alaska, Judith M. Brady, Comm'r of Natural Resources of Alaska, Margaret J. Hayes, Director of Div. of Lands, James E. Eason, Director of Div. of Oil and Gas, and Walter L. Carpeneti, Judge of Superior Court of Alaska,
Appellees/Cross-Appellants.

Nos. 88-4008 and 88-4035

D.C. No. CV 87-521-RCB

[Filed January 2, 1990]

ORDER

Before: Wright, Alarcon, Circuit Judges, and Rafeedie*, District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Wright and Rafeedie recommend rejection of the suggestion for rehearing en banc, Judge Alarcon votes to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Edward Rafeedie, United States District Judge for the Central District of California, sitting by designation.

Appendix D

Pursuant to Sup.Ct.R. 29.1, petitioners include the following list of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of each corporate petitioner:

BP EXPLORATION (ALASKA) INC.

BP America (Parent)
BP International Limited (Parent of BP America)
The British Petroleum Company P.L.C. (Parent of BP International Limited)
Anadromous, Inc.
BP Australia Holdings Limited
BP Canada Inc.
BP Capital BV
BP Developments Australia Limited
BP Finance Australia Limited
BP France
BP North American Finance Corporation Inc.
BP Oil Company
BP Oil Distribution Limited
BP Overseas BV
BP Pipeline (Alaska) Inc.
Britoil P.L.C.
Hope Brook Gold Inc.
Leer Petroleum Corporation
Old Ben Coal Company
Service Station Holdings Inc.
The Standard Oil Company
Truckstops Corporation of America
Western Ground Rents Limited

CHEVRON U.S.A. INC.

Chevron Corporation (Parent)
Canyon Reef Carriers, Inc.
Chervron Capital, N.V.
Chevron Capital U.S.A. Inc.
Chevron Investment Management Company
Chevron Oil Finance Company

Felix Oil Company
Gulf Oil Finance N.V.

EXXON CORPORATION*

AT&S Exploration Ltd.
Abu Dhabi Petroleum Co., Ltd.
Ace Polymer Co., Ltd.
Aditivos Orinoco, C.A.
Adria-Wien Pipeline GmbH
Aircraft Fuel Supply B.V.
Aishin Sekiyu K.K.
Alberta Product Pipe Line Ltd.
Al-Jubail Petrochemical Co., Ltd.
Altona Petrochemical Co., Ltd.
Alyeska Pipeline Service Co.
Arabian American Oil Co.
Aramco Overseas Co.
Aramaco Services Co.
Asakawa Sekiyu K.K.
Atlas Supply Co.
Atlas Supply Co. of Canada Ltd.
Australian Synthetic Rubber Co., Ltd.
Aviation Services Saudi Arabia Ltd.
Awaji Gas Nenryo K.K.
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Ltd.
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Ltd.
Banshu Ekika Gas K.K.
Bayerische Erdgasleitung GmbH
Beaverhill Resources Ltd.
Bel-Air Entreposage S.A.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Byran Woodbine Gathering Inc.
Byron Creek Collieries (1983) Ltd.
Canadian Reserve Oil & Gas Ltd.

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* Does not include companies with less than 5% Exxon ownership.

Carlew Inc.
Carnduff Gas Ltd.
Cary Chemical Inc.
Castle Peak Power Co., Ltd.
Champlain Oil Products Ltd.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chinchaga Resources Ltd.
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Ltd.
Comcor Chemical Ltd.
Commercial Polymers Pty. Ltd.
Cynthia Gas Gathering Co., Ltd.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxion des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTC Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport GmbH
Deutsche Transalpine Oelleitung GmbH
Devon Estates Ltd.
Dixie Pipeline Co.
Dukhan Service Co.
E S F Ltd.
Eagle Kenso K.K.
East Texas Salt Water Disposal Co.
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG
Emirates Chemicals Co.
Emori Sekiyu K.K.
Emsland-Erdoelleitung GmbH

Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft mbH
Esso Chemical Alberta Ltd.
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Ltd.
Esso Resources Canada Ltd.
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Ltd.
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Ltd.
Esso S.A. Francaise
Esso Standard Tunisie S.A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Ltd.
489061 Ontario Inc.
F. T. Giken K.K.
Federated Pipe Lines Ltd.
Ferngas Nordbayern GmbH
Ferngas Salzgitter GmbH
Forjas de Colombia, S.A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Ltd.
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co., Ltd.
General Unyu K.K.
Geobutane—Lavera
Gewerkschaft Brassert Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag

Gewerkschaft Gute Hoffnung Erdgas and Erdoel GmbH
Gewerkschaft Kuchenberg Erdgas und Erdoel GmbH
Glen Park Gas Pipe Line Co., Ltd.
Goroku Sekiyu K.K.
Grande Ecaille Land Co., Inc.
Great Eastern Oil Ltd.
Groupement Immobilier Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Azur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung GmbH
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten K.K.
Hoei Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K.K.
Home Energy Co., Ltd.
Home Oil Co., Ltd.
Hong Kong Pumped Storage Development Co., Ltd.
Houston Regional Monitoring Corp.
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz AG
Imperial Oil Ltd.
Imperial Pipe Line Co., Ltd.
Inada Ekka Gas K.K.
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Ltd.
Intamix Corp.
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Co., Ltd.
Iranian Oil Participants Ltd.

Iranian Oil Services (Holdings) Ltd.
Iranian Oil Services Ltd.
Iraq Petroleum Co., Ltd.
Iraq Petroleum Pensions, Ltd.
Japan Butyl Co., Ltd.
Japan Coal Liquefaction Development Co., Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genentech
K.K. Heian Sekiyu
K.K. Ito Sekiyuten
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Agency
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Sankyo Plastics
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kai Tak Refuellers Co., Ltd.
Kanto Kygnus Sekiyu Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung GmbH
Kawasaki Kygnus Sekiyu Hambai K.K.
Keihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Ltd.
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu K.K.
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K.K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Co. Ltd.

Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas K.K.
Kygnus Kosan K.K.
Kygnus Marketing Service K.K.
Kygnus Sekiyu K.K.
Kyushu Eagle K.K.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres SAREP
Lakehead Pipe Line Co., Inc.
LEAG Aktiengesellschaft fuer luzernisches Erdoel
Les Docks des Petroles d'Ambes
Long Beach Oil Development Co.
Maasvlakte Coal Terminal B.V.
Maasvlakte Olie Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Ltd.
Manito Pipelines Ltd.
Maple Leaf Petroleum Ltd.
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corp. of Houston
Metro Fuel Co., Ltd.
Mikawa Bussan K.K.
Minerals Ltd.
Mittelrheinische Erdgas Transport GmbH
Montreal Pipe Line Ltd./Les Pipe-Lines
Montreal Limitee
Mount Hanikris Ltd.
Mount Thorley Coal Loading Ltd.
Mr. Lube Canada Inc.
Mytex Polymers Inc.
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.

NAM/CLOMS—L 13 B.V.
NPC Services, Inc.
N.V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu K.K.
Nansei Kaihatsu K.K.
Native Venture Capital Co., Ltd.
Near East Development Corp.
Nederlandse Aardolie Maatschappij B.V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei K.K.
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Co., Ltd.
Nissei Sekiyu K.K.
Norddeutsche Erdgas-Aufbereitungs GmbH
Norddeutsche Mineraloelwerke Stettin GmbH
Nordrheinische Erdgas Transport GmbH
Nord-West Oelleitung GmbH
Noroxo
Northward Developments Ltd.
Nottingham Gas Ltd.
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Ltd.
160837 Canada Ltd.
165548 Canada Ltd.
165549 Canada Ltd.
165550 Canada Ltd.
165899 Canada Ltd.
Office Prive d'Assurances et de Courtages
Offshore Medical Support Ltd.
Oil Field Chemicals Co. (Saudi Arabia), Ltd.
Oil Service Co. of Iran (Private Company)
Oil Spill Response Ltd.
Oil Tranport Co. (Saudi Arabia), Ltd.

Oilship Ltd.
Oldenburgische Erdoel GmbH
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai K.K.
Osaka Sekiyu Gas Yuso K.K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corp.
Penisula Electric Power Co., Ltd.
Petroleum Refineries (Australia) Proprietary Ltd.
Petroleum Services (Middle East) Ltd.
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Co.
Portland Pipe Line Corp.
Primaer Oel GmbH
Progas A/S
Progas Ltd.
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Ltd.
Refineria Petrolera Acajutla, S.A.
Rheingas Erdgasleitungs-Gesellschaft mbH
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Ruhrgas AG
S.A. Gestion de Stocks de Securite (SAGESS)
S.A. de la Raffinerie des Antilles
S.A. des Hydrocarbures
S.A. du Pipeline a Produits Petrolieres sur
Territoire Genevois (SAPPRO)
S.A. "Escuela Campo Alegre"
S.A. "Produits Lubrifiants de Madagascar"—
PROLUMA S.A.
S.A.R.L. Viain
S.O.P.—Societa Oleodotti Padani S.p.A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.

Sanyo Sekiyu K.K.
Saraco S.A.
Saudi Arabian Lube Additives Co., Ltd.
Schubert KG
Scurry-Rainbow Oil Ltd.
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seibu Kygnus Sekiyu Hambai K.K.
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM S.p.A.
Servacar Ltd.
Shehtah Drilling Ltd.
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K.K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai K.K.
Smiley Gas Conservation Ltd.
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)
Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S.A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad—S.E.E.R.A.T.

Societe d'Exploitation & de Development d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Co. (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
S.p.A. Raffineria Padana Olii Minerali—SARPOM
Standard Kosan K.K.
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Sueddeutsche Erdgas Transport GmbH
Sun East Co., Ltd.
Syncrude Canada Ltd.
Synergistics Industries Ltd.
204383 Enterprises Ltd.
363011 Alberta Ltd.
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
TGR Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.

Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan K.K.
Taketsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage AG, Mellingen
Tanklager Altishausen AG
Tanklager Gesellschaft, Koln
Tanklager-Gessellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C.V.
Tecumseh Gas Storage Ltd.
Texaco Canada Malaysia Inc.
THUMS Long Beach Co.
Thyssengas GmbH
TIBA Speditions GmbH
Toa Nenryo Kogyo K.K.
Tohko Plastics Co., Ltd.
Tohpren Co., Ltd.
Toko Sekiyu K.K.
Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku K.K.
Tonen System Plaza K.K.
Tonen System Service K.K.
Tonen Tanker K.K.
Tonen Technology K.K.
Tonex Co., Ltd.
Tophus Quen Pty. Ltd.
Towa Compounding Co., Ltd.
Toyoshina Film Co., Ltd.
Transalpine Oelleitung in Oesterreich GmbH
Trans-Arabian Pipe Line Co.
Trans-Northern Pipeline Inc.
Transgaz Lavera
Trimin Resources Inc.
Tsurumaru Unyu K.K.
Turkish Petroleum Co., Ltd.
UBAG—Unterflurbetankungsanlage Flughafen Zurich

Ulan Coal Mines Ltd.
United Industry Development Co., Ltd.
United Collieries Pty. Ltd.
Van Salt Water Disposal Co.
W.A.G. Pipeline Proprietary Ltd.
Wako Jushi K.K.
Wako Kasei K.K.
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-GmbH
Westgas GmbH
Westgastransport B.V.
Winnipeg Pipe Line Co., Ltd.
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Co.
Yoshiki Sekiyu K.K.
Yoshimi Gas K.K.
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

No. 89-1375

In The

Supreme Court of the United States

October Term, 1989

BP EXPLORATION (ALASKA) INC., EXXON CORPORATION, and CHEVRON U.S.A. INC.,

Petitioners,

vs.

DOUGLAS B. BAILY, ATTORNEY GENERAL OF THE STATE OF ALASKA, LENNIE BOSTON-GORSUCH, COMMISSIONER OF NATURAL RESOURCES OF THE STATE OF ALASKA, GARY GUSTAFSON, DIRECTOR OF THE DIVISION OF LANDS, JAMES E. EASON, DIRECTOR OF THE DIVISION OF OIL AND GAS, and WALTER L. CARPENETI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ALASKA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

May a party to a state court lawsuit bypass available state court procedures and seek the disqualification of state court judges and jurors by filing a lawsuit in federal court under 42 U.S.C. § 1983?

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I. STATEMENT OF THE CASE

A. Introduction

This petition arises out of a § 1983 lawsuit filed by Petitioners to enjoin the continued litigation of a state court lawsuit – *State of Alaska v. Amerada Hess Corp., et al.*, 1JU-77-847 Civil ("*Amerada Hess*") – in any court (state or federal) located in Alaska. Petitioners are defendants in *Amerada Hess*, a suit filed by the State of Alaska to recover royalties owing under oil and gas production leases. The crux of Petitioners' claim is that trial of *Amerada Hess* in Alaska will violate their due process right to a fair trial because the judge and all of the jurors will allegedly have a financial interest in the outcome of that trial by virtue of their right to apply for annual dividends under the Alaska Permanent Fund Dividend Program, dividends which might be increased if the State recovers the money damages it seeks in *Amerada Hess*.

The district court denied Petitioners' request for an injunction on ripeness grounds, ruling that Petitioners were obligated to raise their due process claim in the state court before asserting it in federal court. The Ninth Circuit Court of Appeals affirmed this ruling in a unanimous decision.

By their petition, Petitioners seek to establish an unprecedented rule of federal court interference with pending state court proceedings. In effect, Petitioners are attempting to utilize § 1983 as a means of securing an interlocutory ruling from a federal court on a constitutional issue arising in a state court lawsuit. That statute,

however, has never been construed by this Court to permit such an intrusion in an ongoing state court proceeding, and due regard for proper federal/state relations requires that § 1983 not be so construed. The petition for writ of certiorari should be denied.

B. Statement of the Facts

1. The Alaska Permanent Fund Dividend Program

Approximately 1.7 million barrels of crude oil and condensate are taken each day from the Prudhoe Bay and Kuparuk River oil fields located on the North Slope (the Arctic coast) of Alaska. Through 1986, production from these fields exceeded 5.2 billion barrels; it is anticipated that these two fields will ultimately yield a total of 10.7 billion barrels. With roughly 80 percent of the state government's general fund revenues coming from the taxes and royalties derived from the production of oil, oil constitutes the backbone of Alaska's governmental finances.

In view of the nonrenewable nature of this vital state resource, the Alaska Constitution was amended in 1976 to create a Permanent Fund. Alaska Const. art. IX, § 15. In its simplest terms, the Permanent Fund is a public savings and investment account; its purpose is to preserve for future generations a fair portion of the income derived from the production of Alaska's oil and to provide a source of state revenue once the oil runs out. *Williams v. Zobel*, 619 P.2d 448, 453 (Alaska 1980), *rev'd on other grounds*, 457 U.S. 55 (1982). At least 25 percent of all mineral royalties received by the State must be placed in the Permanent Fund and invested; all income from that

investment must be deposited in the State's general fund unless otherwise provided by law. Alaska Const. art. IX, § 15.

In 1982, the Alaska Legislature passed such a law and created the Permanent Fund Dividend Program. Alaska Stat. §§ 43.23.005-095. Under that program every Alaska resident *who applies* may receive an annual dividend funded from the earnings on Permanent Fund investments. The amount of each year's dividend under this statutory program is determined in accordance with a fixed formula. The amount of the 1989 Permanent Fund dividend was $873.16.

2. *Amerada Hess.*

In 1977, the State of Alaska filed the *Amerada Hess* lawsuit in Alaska Superior Court against eighteen North Slope oil producers, including Petitioners in this case. In that suit, the State seeks a declaration of its rights under certain oil and gas leases which it had entered with the oil producer defendants, and it seeks damages for the alleged underpayment of royalties under those leases.

Subsequently, there has been extensive discovery, during which the parties have attempted to account for the disposition of every barrel of oil produced on the North Slope between 1977 and 1986. The State's experts have valued its claims against all producers at about $900 million (including interest). The trial date has been postponed repeatedly and is currently slated to begin no earlier than April 2, 1991.

3. The Proceedings Below.

On November 2, 1987 – the day before the parties were to meet with the state court to schedule *Amerada Hess* for trial and more than five years after the creation of the dividend program giving rise to their due process claim – Petitioners filed the underlying lawsuit in the United States District Court for the District of Alaska. Brought under 42 U.S.C. § 1983, this suit is founded on Petitioners' claim that trial of *Amerada Hess* in any court in Alaska would violate their due process rights to a fair trial under the Fourteenth Amendment to the United States Constitution. Petitioners claim that the judge and all of the jurors will have a financial interest in the outcome of the case by reason of their annual Permanent Fund dividends, which would be increased as a result of a State victory in *Amerada Hess*. More precisely Petitioners allege that, if the State recovers all the damages it seeks in *Amerada Hess*, each year's dividend would initially be increased by approximately $45 and this figure would ultimately rise to around $70 as the remainder of the North Slope oil is recovered from the ground.[1]

Subsequent to the filing of Petitioners' complaint, the state officials, except for Judge Carpeneti[2], moved to

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[1] Given the procedural context of this case, Petitioners' factual allegations were accepted as true. As a matter of actual fact, however, many of Petitioners' allegations may not be accurate. [*See* Footnote 14, *infra*.]

[2] Represented by separate counsel, Judge Carpeneti renounced an active role in this case, agreeing to be bound by the result.

dismiss the action on four grounds, including two relevant here: that abstention was appropriate under *Younger v. Harris*, 401 U.S. 37 (1971), and that the case was not ripe for federal court determination. The district court did not reach the abstention issue and dismissed the action only on ripeness grounds, finding that "the case is not ripe for review because we do not know that Alaska cannot provide a fair forum." [App. to Petition, at A-17.]

Petitioners appealed to the Court of Appeals for the Ninth Circuit, claiming that the district court erred in dismissing the case for lack of ripeness. Respondents cross-appealed, claiming that the case should also have been dismissed on both Eleventh Amendment and abstention grounds.

The court of appeals affirmed, holding that the federal action was not ripe. The court noted that Petitioners had made no effect to utilize available state court procedures to assert their due process/disqualification claim, and the court found no basis for concluding that the available procedures would be inadequate to resolve the issue. [*Id.* at A-9.] The court further found that a prompt due process challenge in the state court could well result in a ruling in Petitioners' favor.[3] [*Id.* at A-10.] "Such a ruling would eliminate the federal constitutional claim without federal court interference and avoid a needless

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[3] This finding is supported by the fact that the district court judge originally assigned to this case (Judge Andrew J. Kleinfeld) disqualified himself pursuant to a motion by Petitioners on the very grounds asserted as the basis for this § 1983 action.

conflict in this nation's dual court system."[4] [*Id.* at A-10 to A-11.]

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[4] Besides affording the state court the opportunity to obviate the need for federal court interference, the court's ruling also gave the state court the opportunity to develop a record to resolve uncertain factual issues. [*Id.* at A-10.] These issues include:

a. Do all judges receive the Permanent Fund dividend? While most Alaskans apply for dividends, all do not. There has been no determination that any Alaska state court judge receives the dividend.

b. In the event that all judges currently apply for and receive the dividend, are there any who would waive such benefits to provide a forum?

c. What is the financial interest at stake? *See* Part II.B., *infra*.

d. Does the alleged financial interest rise to the level of constitutional significance? As discussed below in Part II.B., only substantial interests can support a due process claim. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

e. Does the Alaska Legislature's recent amendment to the statutory dividend program, which precludes the payment of dividends based on income earned from any damages awarded in *Amerada Hess*, eliminate the basis for Petitioners' due process claim? *See* Alaska Stat. § 43.23.045(b), quoted at footnote 15, *infra*.

f. Is there another forum in which *Amerada Hess* could be tried? Petitioners claim that their intent is not to prevent the State from pursuing its claims, but only to require that it do so in "an alternative, disinterested forum . . . such as the court of another state." [Petition at 6.] However, statute of limitations objections could bar the State from adjudicating a major

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II. REASONS FOR DENYING WRIT

Petitioners' case for certiorari is premised upon two claims: first, that the case has "broad implications for the entire range of federal constitutional and civil rights litigation," and second, that the case involves Petitioners' important due process right to a fair forum. [Petition at 10.] Properly viewed, neither of these claims provides sufficient justification for the exercise of this Court's discretionary jurisdiction.

A. This Case has no "Broad Implications" Sufficient to Justify a Grant of Certiorari.

Any case which raises questions regarding the proper relationship between state and federal courts carries the potential for broad impact. To justify a grant of certiorari, however, Petitioners must demonstrate a true need for this Court's involvement in the particular issues raised. Petitioners cannot carry that burden in this case.

As a general rule, § 1983 does not grant federal courts jurisdiction to intervene in pending state court

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portion of its claims in another state's courts. Additionally, there may be no forum that has personal jurisdiction over all of the defendants. Even if there were such a forum, the burden of trying a case like *Amerada Hess* could lead to dismissal on the basis of the inconvenient forum doctrine or for lack of time and space for trial of a matter of essentially local interest to Alaska. If the State were effectively barred from trying *Amerada Hess* in another forum, the rule of necessity may well apply to require trial in Alaska state court. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *United States v. Will*, 449 U.S. 200 (1980).

proceedings to rule piecemeal on federal constitutional issues which may happen to arise in the course of those proceedings.[5] Rather, parties are required to avail themselves of state court procedures to litigate their constitutional claims. Should those claims be denied, the appropriate avenue of federal court review and relief is appeal to this Court following judgment. *See* 28 U.S.C. § 1257.

> Proceedings in state court should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the appellate courts and ultimately this Court.

Atlantic Coast Line R.R. Co. v. Brotherhood of Loc. Eng., 398 U.S. 281, 287 (1970).

In this case, the question for this Court is whether there is something sufficiently special about a due process challenge seeking the disqualification of a judge (or juror) to justify the creation of a new rule of law which

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[5] In *Allen v. McCurry*, 449 U.S. 90, 100-01 (1980), this Court stated,

> In reviewing the legislative history of § 1983 in *Monroe v. Pape* . . . the Court inferred that Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state procedural law, though adequate in theory, was inadequate in practice. [Citation omitted.]

As will be elaborated below, the state court procedures available here are adequate, both in theory and practice, to permit full litigation of Petitioners' due process claim.

would permit a litigant to bypass available state court procedures and seek a decision in the first instance directly from a federal court. The answer is no.

While the alleged financial interest at issue in this case arises by virtue of a unique program, Petitioners' due process claim is essentially indistinguishable from the myriad disqualification claims which arise routinely in many state court cases. Sound policy requires that such claims be litigated in the state courts. Otherwise, § 1983 would be transformed into a vehicle allowing unprecedented interference with pending state court proceedings, and the federal courts would be opened to a flood of lawsuits, the sole purpose of which would be to seek the disqualification, of state court judges. In view of these considerations, the district court acted appropriately in dismissing Petitioners' complaint, and no justification exists for granting the instant petition.

1. The court of appeals' ripeness ruling is consistent with federal case law.

Petitioners have criticized the court of appeals' decision in this case as lacking a "coherent theory" or "consistent rationale." [Petition at 8, 10.] Contrary to these assertions, however, the decisions of both the district court and the court of appeals are premised upon and consistent with well-established principles of justiciability and federalism. When confronted with the question of whether federal court intervention is appropriate to resolve a claim of state court bias, the lower federal courts have consistently required that the claim of bias be first presented to the state court for adjudication.

For example, in *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981), a party to a bar disciplinary proceeding before the Nevada Supreme Court argued that federal court intervention was appropriate because the members of the Nevada court were biased. The court of appeals rejected this contention, stating, "Flangas may not simply ignore the disqualification procedures based upon his perception that his chances of success in disqualifying the biased judges 'are not auspicious.' " *Id.* at 950 (citation omitted).

A similar result was reached in *Dostert v. Neely*, 498 F.Supp. 1144 (S.D.W.V. 1980). Following the example of this Court in *Kugler v. Helfant*, 421 U.S. 117 (1975), which required resort to state disqualification procedures, the court abstained, stating,

> West Virginia's Judicial Code of Ethics, Canon 3, sets rigid standards for insuring the impartiality of judges. This court has every reason to believe that the Canon's strictures will be followed.

Id. at 1150. *Cf. Laird v. Tatum*, 409 U.S. 824, 833 (1972) (in which Mr. Justice Rehnquist ruled on a motion seeking his own disqualification, noting that disqualification is a matter of individual decision under the existing Court practice).

Peterson v. Sheran, 635 F.2d 1335 (8th Cir. 1980), is particularly instructive. There, a disbarred attorney brought a § 1983 action challenging the refusal of the justices of the Minnesota Supreme Court to reinstate him, alleging that they were biased against him. The court of appeals dismissed the case, stating, "The difficulty here is that the bias claim, unless first presented to the state court, does not reach constitutional ripeness." *Id.* at 1341.

The holdings of these cases are consistent with the general rule of ripeness which holds that when a challenge is made in federal court respecting the possibility that a government official might act in an unconstitutional manner, the court must first allow that official to act before assuming jurisdiction of a lawsuit premised on that act.[6] In conformity with this rule, cases have been dismissed where suit was brought only upon the basis of what a state court judge might do.

In *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976), the plaintiff brought a § 1983 action challenging the constitutionality of a durational residency requirement for divorce proceedings. Finding that the plaintiff had never asserted her constitutional claim in the state court, the Second Circuit dismissed her suit for lack of a justiciable case or controversy. The court reasoned that it could not predicate jurisdiction on the speculative assumption that the constitutional claim would be rejected if raised in the state court. *Id.* at 549.

Similarly, in *Cross v. Lucius*, 713 F.2d 153 (5th Cir. 1983), the plaintiffs sought equitable relief in a § 1983 action against Louisiana state court judges to prevent them from applying allegedly unconstitutional statutes of limitations. However, because the plaintiffs had not filed suit in state court, the federal court could only speculate as to whether the challenged statutes would actually be

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[6] Of course, where it is inevitable that the official will act so as to work a deprivation of constitutional rights, the aggrieved party need not await the consummation of that act before bringing an action. In this case, however, no such inevitability exists.

applied by the judges, and the action was dismissed for lack of case or controversy.

The holdings of these cases are buttressed by this Court's decision in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), which arose out of a federal court due process challenge by Texaco to a Texas law requiring the posting of an appeal bond. This Court held that Texaco's claim should have been dismissed, and though that holding was premised on abstention grounds rather than ripeness, the rationale of the Court's decision is applicable here. In part, this Court reasoned that, because the constitutional claims had never been asserted in the state court, it was "impossible to be certain" that Texas law actually gave rise to the claims alleged. *Id.* at 11.

Further, this Court specifically rejected the claim that the state court procedures were not adequate to afford a remedy on the constitutional claims. This Court stated,

> [D]enigrations of the procedural protections afforded by Texas law hardly come from Texaco with good grace, as it apparently made no effort under Texas law to secure the relief sought in this case. . . . [W]hen a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.

Id. at 15. *See also Pulliam v. Allen*, 466 U.S. 522, 541 (1984) ("[i]t no longer is proper to assume that a state court will not act to prevent a federal court constitutional deprivation or that a state judge will be implicated in that deprivation"); *Peterson v. Sheran*, 635 F.2d at 1340 (rejecting a claim that it would be useless to request biased judges to

recuse themselves, "for it is a canon of judicial ethics that a judge must decline to hear a case if biased").

In conformity with these decisions, the courts below properly held that a state court denial of Petitioners' due process/disqualification claim is a necessary predicate to a ripened federal court cause of action. The authorities cited by Petitioners do not contradict this conclusion.

The leading case relied upon by Petitioners is *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973). Petitioners argue that in that case this Court authorized federal intervention in a state optometry board proceeding where the board was "incompetent by reason of bias to adjudicate the issues pending before it." Petitioners, however, fail to note the narrow applicability of that decision. First, *Gibson* involved federal intervention to restrain the actions of a state administrative body. No federal court has expanded upon the *Gibson* rationale to permit interference with state judiciaries.

Second, in *Gibson* there was no indication that there was even any procedure available to challenge the members of the optometry board for bias.[7] *See Flangas v. State Bar of Nevada*, 655 F.2d at 950. Further, as recognized in *Partington v. Gedan*, 880 F.2d 116, 126 n.4 (9th Cir. 1989), even if a procedure was available in *Gibson* for raising the due process claim, an optometry board lacks the basic expertise and competence to rule on such constitutional

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[7] As recognized in *Allen v. McCurry*, 449 U.S. at 100-01 (quoted at footnote 5, *supra*), a § 1983 action may lie where state procedural law is inadequate to allow full litigation of the constitutional claim.

issues. Accordingly, *Gibson* may be distinguished from the case at bar as involving a situation in which, consistent with *Allen v. McCurry*, it was proper for a federal court to assume jurisdiction under § 1983.

Petitioners also cite to *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506 (1989), and *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986), but those cases addressed issues very different from that raised here. In the former case, the same party brought two actions, one in federal court and one in state court, to contest the validity of a city council's utility rate order. This Court held that the district court erred in abstaining, noting that "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 109 S.Ct. at 2520. Without doubt, the quoted rule of law is correct, but it does not address the ripeness question raised in this case.

In *Dayton*, this Court merely reaffirmed the accepted proposition that "a reasonable threat of prosecution for conduct allegedly protected by the Constitution gives rise to a sufficiently ripe controversy." 477 U.S. at 625 n.1 (citation omitted). Again, the case is inapposite and has no bearing upon the issue raised in this case.[8]

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[8] In addition to citing to these cases, Petitioners also argue that the lower courts' ripeness rulings require an exhaustion of remedies which is not required for a § 1983 action. *See Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982). In making this argument, however, Petitioners are confusing the doctrines of ripeness and exhaustion. While the former "rests on the

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In sum, the courts below acted appropriately and reasonably in dismissing Petitioners' complaint on ripeness grounds, and that dismissal was consistent with the decisions of both this Court and other lower federal courts. Before being heard to complain that they have suffered a deprivation of due process in the state courts, Petitioners must be required to present that claim to the state courts. Unless and until that claim is presented and denied, Petitioners should not be permitted to complain in a federal court that they have been deprived of their due process rights.

2. The decisions of the lower courts are also affirmable on abstention grounds.

Because of the ruling on the ripeness issue, both of the courts below declined to consider the merits of Respondents' assertion that abstention was appropriate under the principles of comity and federalism embodied in the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971). In assessing the merits of this petition, however, this court

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ground that further state proceedings may forestall an injury that is only anticipated, or may change the nature of the issue presented." 13A C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 3521.1, at 126-27 (2d ed. 1984), the latter presumes the existence of the injury and seeks to determine the appropriate forum for redress. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985). In this case, Petitioners must raise their due process challenge in the state court, not as a remedial measure, but as a means of clothing the due process issue with the finality necessary to a ripened federal court claim.

should consider the fact that the *Younger* doctrine provides an independent and fully justifiable basis for affirming the actions of the courts below. Hence, there is no compelling reason for this Court to grant certiorari.

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Id. at 43. In *Younger*, this Court gave expression to this general policy and held that a federal court could not enjoin a state court criminal action. Consistent with the vital considerations of comity and "Our Federalism" upon which that decision was based, this Court has extended the doctrine of *Younger* to bar interference with some civil proceedings.[9] Ultimately, in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), this court delineated a three-pronged test for determining whether *Younger* abstention is appropriate in a civil case.

> [A]bstention is appropriate in favor of a state proceeding if (1) the state proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions.

In this case, there is an ongoing state judicial proceeding (*Amerada Hess*). Thus, the question is whether the second and third prongs of the *Middlesex* test are satisfied. They are.

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[9] *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil action seeking the return of wrongfully received welfare payments); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (civil nuisance proceeding).

a. Vital state interests are implicated.

(1) Alaska's interest in oil as a vital economic resource.

Oil revenues play a paramount role in the governance of Alaska. With over 80 percent of general fund revenues derived from oil production taxes and royalties, income from the production of oil constitutes the primary source of State revenue. It is this money which funds state government in all its facets and permits it to perform its basic functions.

In granting Alaska's admission to the Union, Congress expressly recognized Alaska's special interest in its royalties. Traditionally, Congress had limited statehood land grants to non-mineral lands, retaining federal ownership of commercially valuable mineral properties. *Trustees of Alaska v. State*, 736 P.2d 324, 333 (Alaska 1987), *cert. denied*, 486 U.S. 1032 (1988). In considering statehood for Alaska, however, some in Congress voiced the objection that "the territory was economically immature and would be unable to support a state government." *Id.* at 335. To respond to this objection, Congress took the unprecedented step of granting to the new state over 100 million acres of land with the attendant mineral rights. Alaska Statehood Act, § 6(a) and (b), 48 U.S.C. § 21. "The intent of Congress was, of course, to provide the new state with a solid economic foundation." *United States v. Atlantic Richfield Co.*, 435 F. Supp. 1009, 1016 (D. Alaska 1977), *aff'd*, 612 F.2d 1132 (9th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980). The "primary purpose" of this land grant was "to ensure the economic and social well-being of the new state." *Trustees of Alaska v. State*, 736 P.2d at 335. *See*

also Udall v. Kalerak, 396 F.2d 746, 749 (9th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969). In conformity with Congress' express recognition of the importance of oil revenues for Alaska, this Court should find that the oil royalties at issue in *Amerada Hess* implicate a vital state interest within the meaning of *Younger*.[10]

(2) Alaska's interest in the integrity of its judiciary.

Alaska has an equally important interest in the integrity and fairness of its judicial system, and this action directly challenges that interest. As this Court recognized in *Huffman v. Pursue, Ltd.*, 420 U.S. at 604,

> [I]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference . . . can readily be interpreted 'as reflecting negatively upon the state courts' ability to enforce constitutional principles.' [Citations omitted.]

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[10] There exists a strong federal policy of nonintervention in state revenue matters. This policy is embodied in the Tax Injunction Act, 28 U.S.C. § 1341, which prohibits a federal court from issuing injunctions or ordering other equitable relief which suspends or restrains the assessment, levy, or collection of any state tax. *California v. Grace Brethren Church*, 457 U.S. 393, 407-11 (1982). Though this act does not technically apply to this case because the royalties in issue in *Amerada Hess*

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By this action, Petitioners threaten more than that interference with the state judiciary which always accompanies an attempt to enjoin a pending state court action. Petitioners' due process claim directly impugns the fairness and integrity of the Alaska Judicial system; it impugns the state court's ability to decide constitutional questions and to safeguard basic constitutional rights. The importance of the state interest implicated is great, and abstention is appropriate.[11]

b. The petitioners have adequate opportunity to raise their constitutional claim.

The procedures available in the state court accord Petitioners ample opportunity to present federal claims.

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are not taxes per se, the policy behind the act applies with equal force to require federal court abstention. *See Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 103 (1981); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 525 n.33 (1981).

[11] *Ciaffoni v. Supreme Court of Pennsylvania*, 550 F. Supp 1246 (D.Pa. 1982), *aff'd*, 723 F.2d 896 (3d Cir. 1983), is directly on point. There, the plaintiffs brought a § 1983 action, alleging that they were denied a fair trial and impartial appellate review by reason of the malevolence, conflicts of interest, and bias of present and past members of the state judiciary. The district court dismissed the case on a number of grounds, including *Younger* abstention. In so ruling, the court found the requisite important state interest, stating, "[T]here can be no doubt that the state courts have a genuine interest in considering and resolving allegations of bias and prejudice . . . ." *Id.* at 1251. *See also Cadena v. Perasso*, 498 F.2d 383 (9th Cir. 1974) (court abstained under *Younger* in case challenging judge's failure to disqualify himself).

Apart from Alaska Statute § 22.20.020, which establishes a procedure for disqualifying judges for cause, Petitioners may assert their due process claim by motion in the state court.[12]

The fact that Petitioners' claim goes to the bias of the state court does not obviate the adequacy of these procedures. As this Court noted in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 628 (1986),

> [W]e have repeatedly rejected the argument that a constitutional attack on state procedures themselves 'automatically vitiates the adequacy of those procedures for purposes of the *Younger-Huffman* line of cases.' [Citation omitted.]

See also Flangas v. State Bar of Nevada, 655 F.2d at 950; *Dostert v. Neely*, 498 F. Supp. at 1150. Similarly, as discussed above, this Court in *Pennzoil Co. v. Texaco, Inc., supra*, addressed the issue raised here in a broader context and held that comity required deference to pending state court proceedings where the party bringing the federal suit had made no effort to utilize available state court procedures to raise its constitutional claim.

Consistent with the holdings of these cases, the available state court procedures do allow Petitioners adequate opportunity to raise their due process claim. Abstention

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[12] Petitioners argue that such procedures are inadequate since all state court judges are subject to disqualification, but they do not refute the fact that they would be free to assert a blanket motion, challenging the entire Alaska judiciary on due process grounds. Petitioners may also file a like motion challenging the competence of all Permanent Fund dividend recipients to serve as jurors.

under *Younger v. Harris*, therefore, provides an alternative basis for upholding the decision of the lower courts.

B. Petitioners' Due Process Claim Lacks the Merit to Justify Present Review by this Court.

In assessing the merits of this petition, this Court should also give some consideration to the merits of Petitioners' underlying claim of a due process deprivation. While Respondents do not dispute Petitioners' right to raise their due process claim in the state court, they do dispute the assertion that that claim is of sufficient merit to justify this Court's present review of the matter.

Properly, the precedents of this Court establish a litigant's due process right to an impartial and unbiased tribunal. *E.g., Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam); *Tumey v. Ohio*, 273 U.S. 510 (1927). In contrast to these cases, however, the financial interest alleged in this case is not sufficiently substantial to support a finding of a due process violation.[13] *See Gibson v. Berryhill*, 411 U.S.

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[13] In *Tumey*, a village mayor's only compensation for sitting as a judge in prohibition cases was the $12 fee which was paid to him only upon conviction of the defendant. Over an eight month period, the mayor received $696 (in 1920's dollars) for serving as a judge. *Connally* involved a justice of the peace who was virtually in the business of selling search warrants. His only income was derived from the $5 fees he was paid upon issuing warrants; within the previous few years he had issued "some 10,000 warrants"; and he testified that in deciding whether to issue a warrant, he considered the fee which would be paid to him. 429 U.S. at 246 & n.3.

at 579 (those with "substantial" pecuniary interests should not adjudicate disputes); *Tumey v. Ohio*, 273 U.S. at 523 (same).

Petitioners alleged in their complaint below that the recovery of all of the damages sought by the State in *Amerada Hess* would result in an ultimate $2.6 billion recovery by the State, which would yield an eventual $70 increase in the annual Permanent Fund dividend. This allegation was based on the claims that: 1) the State would recover one billion dollars in damages for the underpayment of past royalties; 2) the theory of that damage award would entitle the State to an additional one billion dollars in royalties on future oil production, and 3) the damage award would entitle the State to another $600 million in price adjustments on royalty oil already sold by the State itself. Even assuming these numbers to be correct,[14] Petitioners' due process claim is subject to considerable doubt as a matter of law.

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[14] With respect to the damages directly at issue in *Amerada Hess*, Petitioners' numbers are based on an inaccurate characterization of a state document which estimated the value of pending State oil royalty *and tax* claims. In fact, based on expert reports completed subsequent to the initiation of this lawsuit, it is the State's position that Petitioners and the other North Slope oil producers owe slightly in excess of $900 million (including interest).

As to the effect of *Amerada Hess* on royalties on future production, Petitioners' estimate is highly speculative. Since some of the major North Slope oil producers have already adjusted their royalty accounting methodology, it is not clear that the verdict in *Amerada Hess* will result in any meaningful increase in future royalty payments.

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In the first place, subsequent to the filing of Petitioners' complaint, the State Legislature amended Alaska Statute § 43.23.045(b) to provide that Permanent Fund dividends would not be based on any money damages awarded to the State in *Amerada Hess*. While a portion of such money would be deposited into the Permanent Fund (as required by the Alaska Constitution), any earnings on that money would not be available for distribution as dividends. Rather, the earnings would be returned to the principal of the Permanent Fund.[15]

Additionally, it is significant that any remaining portion of the alleged dividend increase would flow neither

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Finally, with respect to the recovery of amounts owing the State pursuant to retroactive price adjustments to previous sales of royalty oil, the State calculates its entitlement to be $378 million. However, the purchasers' actual ability to pay this price adjustment is open to serious question and the money may never be collected from them.

[15] As amended, Alaska Stat. § 43.23.045(b) provides,

> Notwithstanding any contrary provision of law, each year the commissioner shall transfer to the dividend fund 50 percent of the income of the Alaska permanent fund earned during the fiscal year ending on June 30 of the current year and available for distribution. *However, income earned on money awarded after trial in State v. Amerada Hess, et al., 1JU-77-847 Civ. (Superior Court, First Judicial District) shall be treated in the same manner as other income of the Alaska permanent fund, except that it is not available for distribution to the dividend fund, and shall be annually deposited into the principal of the Alaska permanent fund.* [Emphasis added.]

immediately nor directly from a State victory in *Amerada Hess*.[16] First, the Permanent Fund itself would be increased only upon the occurrence of future events: 1) the payment of royalties on future oil production, which well continue into the next century, and 2) the subsequent recovery of the amounts due under the *Amerada Hess* adjustment clauses, the collection of which may very will require litigation or be impossible. Second, under the statutory scheme, the full impact on dividends flowing from the deposit of these monies into the Permanent Fund would not occur until the fifth year after investment.[17] Thus, Permanent fund dividends would not be increased immediately even if the State were to win *Amerada Hess*; rather, the full impact would not be realized for decades.

Furthermore, the alleged increase in dividends is subject to additional contingencies. For example, the

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[16] As suggested by one commentator, the substantiality of an alleged financial interest should depend on the size of the interest and its remoteness or contingency. Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 753 (1973). This approach has been followed by a number of lower federal courts in addressing disqualification motions made under the federal recusal statute, 28 U.S.C. § 455. *See In re New Mexico Natural Gas Antitrust Litigation*, 620 F.2d 794, 796 (10th Cir. 1980); *In re Virginia Elec. and Power Co.*, 539 F.2d 357, 383 (4th Cir. 1976); *Alaska Oil Co. v. State of Alaska*, 45 B.R. 358, 361 (D. Alaska 1985) (addressing a disqualification motion based on the interest arising out of increased Permanent Fund dividends).

[17] Under the statutory dividend formula, dividends are funded from 21 percent of the total net income from Permanent Fund investment over the past five fiscal years. Alaska Stat. § 37.13.140.

annual payment of dividends is subject to legislative appropriation, which, as evidenced by the legislature's recent action amending Alaska Statute 43.23.045(b), cannot be guaranteed. Though Petitioners argue that the payment of dividends is mandatory under state law, [Petition at 4 & n.2], the Alaska Constitution requires an annual appropriation for all state expenditures. Alaska Const. art. IX, § 7 (prohibiting the dedication of state funds). *See also* 1975 Op. Alaska Att'y Gen., No. 9; 1959 Op. Alaska Att'y Gen., No. 7. More fundamentally, the very existence of the Permanent Fund dividend program cannot be guaranteed. Unlike the Permanent Fund itself, which is established by the state constitution, the dividend program is statutory and may be altered or abolished by the legislature at any time. Again, the amendment to Alaska Statute § 43.23.045(b) bears this point out.[18]

Thus, the basic merit of Petitioners' due process claim must be questioned. Contrary to Petitioners' claim, the Alaska judge and jurors will not have an interest in the outcome of *Amerada Hess* sufficient to justify their disqualification. Accordingly, Petitioners will not suffer a deprivation of due process in the state court, and there is no need for this Court to exercise its discretionary jurisdiction to safeguard Petitioners' constitutional rights.

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[18] On another front, Alaska Governor Steve Cowper is actively and publicly promoting a proposal which would place a cap on dividends and direct the remainder into an education fund. House Joint Resolution No. 13 (16th Alaska Legislature). If such a cap were imposed, no increase to the dividend would be possible.

III. CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 89-1375

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

BP EXPLORATION (ALASKA) INC.,
EXXON CORPORATION, and CHEVRON U.S.A. INC.,
Petitioners,

VS.

DOUGLAS B. BAILY, ATTORNEY GENERAL OF THE STATE OF ALASKA, LENNIE BOSTON-GORSUCH, COMMISSIONER OF NATURAL RESOURCES OF THE STATE OF ALASKA, GARY GUSTAFSON, DIRECTOR OF THE DIVISION OF LANDS, JAMES E. EASON, DIRECTOR OF THE DIVISION OF OIL AND GAS, AND WALTER L. CARPENETI, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ALASKA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF*

1. Our Petition points out that the court of appeals failed to offer any single, coherent rationale for its "ripeness" decision dismissing petitioners' claim to a constitutionally fair forum in an action seeking literally billions of dollars. Instead, the court of appeals inconsistently and variously suggested that this case was

* Petitioners' parent companies and non-wholly owned subsidiaries are listed in the Appendix to the Petition, pp. A-21 to A-23.

not ripe because (1) petitioners had not invoked state disqualification procedures to attempt to cure the alleged bias; or, alternatively, (2) the facts establishing the existence of the claimed financial interest had not yet been proved at trial; or, alternatively, (3) petitioners had not presented their due process claim for decision by the biased state court. See Petition, pp. 8-9, 14-18.

Respondents make no serious effort to defend the first two of the grounds proffered by the court of appeals.[1] Indeed, they essentially admit that state disqualification procedures can provide no remedy because every Alaska judge and juror possesses the same disqualifying financial interest, and the recusal of one judge or juror would simply result in their replacement by another possessing the same unconstitutional bias.[2] Thus, as pointed out in the Petition (Petition, pp. 17, 21-23), this case is not "essentially indistinguishable from the myriad disqualification claims which arise routinely in many state court cases," as respondents assert. Br.in Opposition, p. 9. The cases relied upon are clearly inapposite, either because they involved no claim that the state tribunal was biased at all,[3] or because they are cases in which it was claimed only that particular state judges or jurors possessed a

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[1] Respondents simply note in passing (Br.in Opposition, p. 6, n. 4) that there are alleged unanswered factual questions, without explaining why they are relevant to a *ripeness* decision, rather than to the validity of the due process claim on the merits. Petition, pp. 15-16. Elsewhere, respondents concede the irrelevance of this argument, because "[g]iven the procedural context of this case, Petitioners' factual allegations were accepted as true." Br.in Opposition, p. 4, n. 1.

[2] Indeed, it is undisputed that a state law challenge to an Alaska juror based on the alleged bias in this case is not even possible, as Alaska recently amended its court rules to provide that no juror may be challenged on the ground of his or her financial interest as a Permanent Fund dividend recipient. See Alaska Civ.Rule 47(c)(12).

[3] *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987); *Pulliam v. Allen*, 466 U.S. 522 (1984); *Cross v. Lucius*, 713 F.2d 153 (5th Cir. 1983); *Mendez v. Heller*, 530 F.2d 457 (2d Cir. 1976).

subjective bias, not that all judge and jurors in the state were objectively and incurably disqualified.[4]

2. Respondents' only real effort to defend the decision below is to urge that the court was correct in its third possible ground of decision—the conclusion that a federal section 1983 action cannot be "ripe" until the federal constitutional question at issue has first been presented to and decided by the biased state court itself. Br.in Opposition, pp. 9-15.[5] Thus, respondents assert that "parties are required to avail themselves of state court procedures to litigate their constitutional claims" (id., p. 8), subject only to review by this Court on certiorari, and that no denial of due process can be said to have occurred "[u]nless and until that claim is presented [to] and denied" by the courts of the state. Id., p. 15.

This claim is wholly unsupportable. Indeed, that very contention was explicitly and squarely rejected by this Court over seventy-five years ago in its foundation decision in *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278 (1913), where the Court observed:

> "as the Constitution of the United States is the paramount law, as much applicable to States, or their officers, as to others, it would come to pass that in every case where action of a state officer was complained of as violating the Constitution of the United States, the Federal courts in any form of procedure, or in any stage of the controversy, would have to await the determination of a state court as to the operation of the Constitution of the United States. It is manifest that in necessary operation the doctrine which was sustained would in substance cause the state courts to become the primary

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[4] *Kugler v. Helfant*, 421 U.S. 117 (1975); *Laird v. Tatum*, 409 U.S. 824 (1972); *Partington v. Gedan*, 880 F.2d 116 (9th Cir. 1989); *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9th Cir. 1981); *Peterson v. Sheran*, 635 F.2d 1335 (8th Cir. 1980); *Dostert v. Neely*, 498 F.Supp. 1144 (S.D.W.Va. 1980).

[5] Repondents' argument that a "blanket" disqualification motion should be filed (Br.in Opposition, p. 20, n. 12) is simply another version of this argument.

> source for applying and enforcing the Constitution of the United States in all cases covered by the Fourteenth Amendment." Id. at 285.

See also *New Orleans Public Serv. v. Council of New Orleans*, 109 S.Ct. 2506, 2520 (1989) ("there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts); cf. *R.R. Commission v. Duluth St. Ry.*, 273 U.S. 625 (1927) (plaintiff not required to submit claims to state court whose decision may be preclusive).[6]

Similarly, the contention that 42 U.S.C. § 1983 "does not grant federal courts jurisdiction to intervene in pending state court proceedings" to protect federal constitutional rights (Br.in Opposition, pp. 7-8) is plainly misplaced. Absent any recognized basis for abstention—and none is present here (infra, pp. 5-6)—it decidedly *is* the role and duty of the federal courts to pass on federal constitutional claims in the exercise of the jurisdiction that Congress has conferred under section 1983:

> "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights * * *. * * *[F]ederal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person's constitutional rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (emphasis added).

Respondents additionally disregard that this action does not simply involve a "federal constitutional issue[] which may happen to arise *in the course of* [state] proceedings." Br.in Opposition, p. 8 (emphasis added). It involves instead a claim that the entire conduct of proceedings in a court all of whose judges and

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[6] Respondents provide no response at all to the point that the court of appeals' "ripeness" dismissal, which necessarily is without prejudice to petitioners' right to return to federal court following a ruling by the state court, conflicts with the general principle that a ruling by the state court on petitioners' due process claim would be preclusive of subsequent federal court litigation. See *Allen v. McCurry*, 449 U.S. 90 (1980).

jurors possess a constitutionally disqualifying financial interest must be enjoined.

3. Respondents further attempt to support the decision on the ground (not reached below) "that the *Younger* doctrine provides an independent and fully justifiable basis for affirming the actions of the courts below." Br.in Opposition, p. 16. But, in *Gibson v. Berryhill*, 411 U.S. 564 (1973), this Court established that *Younger* abstention is not proper where the state tribunal is "incompetent by reason of bias to adjudicate the issues pending before it." Id. at 577. Respondents attempt to evade this controlling decision by the specious contention that *Gibson* involved a biased state administrative body, while this case involves a biased state court. Br.in Opposition, p. 13. For purposes of *Younger* abstention, however, this Court has repeatedly held that there is no relevant distinction between state court proceedings and state administrative proceedings that are judicial in nature. *Middlesex Ethics Comm. v. Garden State Bar Assn.*, 457 U.S. 423, 433-434 (1982); *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 627 (1986).

Respondents also attempt to evade *Gibson* by claiming that there was no procedure available for challenging the biased decisionmakers in *Gibson*. Br.in Opposition, p. 13. Even assuming this were true, however, it would be irrelevant. The explicit premise of *Gibson* is that there must be an opportunity to raise the federal issues before a "*competent* state tribunal" (*Gibson*, supra, 411 U.S. at 577 (emphasis added)), and it is beyond question that no such opportunity exists in this case.[7]

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[7] Because abstention is clearly foreclosed under *Gibson*, respondents' lengthy attempt to establish that the *Hess* action involves a vital state interest is irrelevant. See Br.in Opposition, pp. 17-19. In any event, however, petitioners note that there is no authority for the proposition that a proprietary contractual claim for oil royalty payments involves an important state *governmental* interest sufficient to justify *Younger* abstention.

Similarly, because petitioners do not challenge the state's processes for enforcing its judgments or any other state procedure, but rather the state's attempt to prosecute its royalty claim before a biased tribunal,

Respondents' purported reliance on *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (Br.in Opposition, p. 12) is also unavailing. *Pennzoil* did not hold that federal claims are not ripe for decision by a federal court whenever they could be decided in state court, as respondents contend. Instead, this Court simply held that the lower courts should have *abstained* where the state proceedings involved a vital state interest and where there was no claim that the entire state tribunal was biased. That decision, based on satisfaction of the specific requirements strictly limiting the circumstances in which federal courts may properly abstain from the exercise of their jurisdiction—requirements not met here (Petition, pp. 18-23)—has no relevance to the correctness of the court of appeals' *ripeness* decision in this case.

4. Respondents provide no persuasive response to the fact that the court of appeals' decision conflicts with the settled rule that exhaustion of state remedies is not required in actions under 42 U.S.C. § 1983. See *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). Respondents refer to *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (Br.in Opposition, p. 15, n. 8), but there this Court held simply that a developer could not challenge the application of a zoning ordinance as a taking until it sought and was denied a variance. Until that time, no taking could be said to have occurred. In this case, in contrast, respondents are presently being denied due process of law by the existing and continuing prosecution of the *Hess* action before a biased state tribunal, and no "variance" is possible because all Alaska judges and jurors are subject to the same disqualifying financial interest.

5. Finally, disregarding that neither of the courts below even reached the merits of the controversy, let alone disposed of them, respondents urge this Court to deny certiorari on the ground that petitioners' due process claim allegedly lacks merit. Br.in Opposition, pp. 21-25. Not only is this suggestion self-evidently incor-

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this case does not involve the interests found sufficient in *Pennzoil*, supra, and *Juidice v. Vail*, 430 U.S. 327 (1977).

rect,[8] but it is clear, in any event, that petitioners have stated a viable claim for relief.[9]

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[8] Respondents' motion to dismiss petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim was denied by the district court, and respondents did not appeal that ruling.

[9] Respondents rely on a recent amendment to the Alaska statute governing the funds available for distribution as Permanent Fund dividends. Respondents concede, however, that this statute is limited to "money damages awarded to the State in *Amerada Hess*" and has no application to the bulk of the increased revenues petitioners allege the state will receive if it prevails in *Hess*, through increased future royalty payments and through additional payments under existing contracts containing an *Amerada Hess* adjustment clause. Br.in Opposition, pp. 23-24.

Respondents also claim that it is "significant" that these increased revenues will not flow "immediately" or "directly" to the state, and that dividend checks will not "immediately" increase upon the state's receipt of the money. Br.in Opposition, p. 24. There is no doctrine, however, that a judge or juror's financial interest in a case may be excused on the ground that the financial benefit may be slightly delayed, or that the benefit may not be as great at first as in later years. Similarly, there is no merit to respondents' argument that the financial interest in this case should be ignored because the continuation of the Permanent Fund dividend program cannot be "guaranteed." Id., p. 25. The entirely speculative possibility of some hypothetical future legislative action is not sufficient to defeat the presently existing financial interest in this case. Cf. *Albertson v. SACB*, 382 U.S. 70, 76-77 (1965).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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